Supreme Court, U.S.
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No. 07A620

IN THE
Supreme Court of the United States

Alireza Bakhtiari,
Petitioner,

v.

Dr. Paula M. Lutz (in her official capacity) and
University of Missouri (corporate entity),
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

BRIEF OF PETITIONER

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QUESTIONS PRESENTED

1) In the context of a Title VII-retaliation matter, in order to determine whether the protected activity element has been satisfied, should the courts take the "substantive law" approach by analyzing the opposition, participation, reasonableness and good-faith nature of the employee's complaint?

2) In addressing spoliation of evidence, are the two questions (a) remedying prejudice for spoliation and (b) sanctioning culpable conduct, two distinct questions in front of the court?

3) In the context of a Title VII-retaliation and due process matter, including a state-wide entity defendant, does the allegation of intentional, orchestrated and patriotic spoliation of relevant electronic evidence by the defendants give rise to an extensive question of facts and credibility?

4) Does the inferential weight of the jury's role in the judicial process increase, when some of the facts supporting and clarifying the nature the above opposition and participation activities (question 1), have been blinded by the above spoliation of evidence (question 2)?

PARTIES TO THE PROCEEDINGS

All parties are listed in the caption.

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OPINOINS BELOW

The Honorable Audrey G. Fleissig, The United States Magistrate Judge for the US District Court of Eastern Missouri, entered an Order denying Petitioner's Motion for Sanction for Spoliation of Electronic Evidence on August 11, 2006. The Order is reproduced in the Petition Appendix at page 1 ("Pet. App.-1"). The District Court entered an Order, granting summary judgment to Respondents on all counts on September 15, 2006 (Pet. App.-9). Petitioner appealed, the Eighth Circuit affirmed and entered judgment on November 15, 2007 (Pet. App.-33).

JURISDICTION

The court of appeals, entered judgment on November 15, 2007 (Pet. App.-33). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). On January 25, 2008 Justice Alito extended the time for filing a petition in this case to and including March 14, 2008.

STATUTES OR OTHER PROVISIONS INVOLVED

Title VII - Section 704 of the Civil Rights Act of 1964 (42 U.S.C. §§ 2000e-3) is excerpted in the Appendix to this brief (Pet. App.-44).

STATEMENT OF THE CASE

In the decision below, the Eighth Circuit takes too of a narrow, semantic and superficial read from the Title VII of Civil Rights Act, in a way which it completely undermines the purpose and the spirit of the Act of Congress, which was initially purposed to keep school and

the workplace free from discrimination and retaliation (and intimidation in a sense).

Threat of taking the discrimination complaint (racial and other types) among academic employees to the US Department of Education-Civil Rights Office ("USDE"), and keeping the academic employer informed that actually appointments have been made with USDE to do so, constitutes protected activity. The lower courts disagree.

Also in the decision below, the Eight Circuit insists on two simultaneous grave evidentiary errors, it admits that the evidence is lost as a result of elimination of evidence by the respondents and takes no action to remedy the resultant prejudice, and in a clear error, it ignores very obvious inconsistencies in Respondents' explanations which would giving rise to a clear inference of intent on the spoliator's part.

Accordingly, the judgment below s' ould be reversed.

Retaliatory Termination

Petitioner, Alireza Bakhtiari, an Iranian national, was a resident of the state of Missouri and a former Ph.D. student and a former employee of the chemistry department at the University of Missouri-Rolla ("UMR"). Bakhtiari's employment was terminated by UMR on January 21, 2004.

In October 2001, while Petitioner was living in Iran, the Chemistry Department at UMR, after pursuing him and persuading him to join their program, informed him that he was being recruited as a Graduate Teaching Assistant. The Chemistry Department is a subdivision of the College of

Arts and Sciences at UMR. The collective documents provided to Bakhtiari define the term of the agreement as January 6, 2002 through December 31, 2006. On January 11, 2002, Petitioner reported to the Chemistry Department and began working as a Graduate Teaching Assistant.

As part of his Ph.D. studies, he enrolled in an advanced inorganic chemistry course with Dr. Gary Long in the winter semester 2002. Petitioner filed a grade appeal and grievance based upon Dr. Long's absenteeism, wrongful course management and capricious grading.

A hearing on the matter was conducted on November 22, 2002. Respondent Dean Dr. Lutz (at the time Dean of College of Arts and Sciences-UMR) Chaired the meeting, she took evidence from Dr. Long, **she did not take evidence from Petitioner**. After the hearing, Dr. Lutz and Bakhtiari both agreed that the matter was not concluded and future hearings were necessary on the matter.

From November 2002 until January of 2004, Petitioner persistently emailed and telephoned Defendant Lutz and requested a resumption of the hearings on his grade appeal, so he could present his evidence.

Defendant Lutz relied on variety of reasons to postpone the second hearing. The absence of Dr. Gary Long from the country was one of her common reasons.

Bakhtiari emailed Defendant Lutz every month and voiced his opinion to Dr. Lutz that she was addressing the grade appeal in a discriminatory manner (discrimination based on race and status). Petitioner informed in the emails to Dr. Lutz that as result of a "C" grade still standing on his records, his career has been affected, mainly he could not

promote chemistry among his students, since he had no credibility among them with a "C grade". The emails memorializing this communication have not been produced because they were deleted by the Respondents (this is the basis of Petitioner's spoliation motion).

In a joint signed letter, Petitioner and his colleagues expressed their concern about Dr. Long' grade appeal being un-resolved by Respondent Lutz.

At the end of 2003, Bakhtiari spoke with Defendant Lutz's Secretary, Barbara J. Palmer in an off-campus new years eve party, about concluding the Gary Long hearings. Petitioner requested Ms. Palmer relay to Dr. Lutz that he was frustrated and wanted the Gary Long hearings to conclude. He suggested a deadline of January 2004 to Respondent Lutz in his message. According to her testimony under oath, Palmer took the above message, *verbatim*, from Bakhtiari to Respondent Lutz (Barbara J. Palmer was deposed during the discovery and her testimony is on the record).

At the end of 2003, "The Committee on Effective Teaching and Faculty Awards" of UMR determined the Teaching Effectiveness Factors (TEF) for the Faculty and Teaching Assistants in the university including the Chemistry Department. Petitioner scored a 3.2, while the average for the whole campus was 2.5 and 2.9 for the Chemistry Department. Bakhtiari's written evaluations from students described him as an excellent chemistry instructor. According to Petitioner's effectiveness factor, as measured by Respondents themselves, he was a 28 percent better graduate TA than those in the Chemistry Department on average, and 10 percent better than the UMR average. The Chemistry Department has 55 to 75 graduate students

on average. Eleven of the undergraduate students who attended Bakhtiari's classes in his last semester on UMR campus were deposed; they opined that Petitioner a top notch instructor.

In the winter semester 2004, Dr. Hoiness (chemistry vice-chairman) assigned Petitioner to redesign and re-write the Freshman Chemistry laboratory syllabus. This job was a desk job, it only included interaction between Bakhtiari and Dr. Hoiness. This job started on January 12, 2004. On January 8, 2004, Petitioner was enrolled as a student and employee of the UMR. The winter semester 2004 began with classes on January 12, 2004. Bakhtiari started his assignment, as a course re-designer, for winter 2004 on January 12, 2004.

On the morning of January 21, 2004, Petitioner emailed Dr. Lutz and informed her that he had an appointment with US Department of Education ("USDE")-Civil Rights Office the next day (on 22nd afternoon). On the same day (January 21st, afternoon) Dr. Ekkehard Sinn, Chair of the Chemistry Department, informed Petitioner that Respondent Lutz had decided to dismiss him as a teaching assistant. No reason was given for Bakhtiari's dismissal. He immediately asked for dismissal according to the "Procedures in Case of Dismissal for Cause" called for in the University of Missouri's handbook. Between January 21, 2004 and March 15, 2004, Petitioner frequently contacted Dr. Lutz's office and personally asked for the reasons for his dismissal and asked for his rights according to the UM Handbook.

Termination occurred on the same day as Bakhtiari emailed Lutz that he had an appointment the next day with the Civil Rights Office in regards to her discrimination,

alternatively, termination occurred three weeks after Barbara Palmer (Lutz's secretary) took the message to her. Respondent Lutz was, at the time, unwilling to talk to or meet with Petitioner or afford him his handbook rights. Dr. Lutz was unwilling to give anyone any reason for Petitioner's termination.

Petitioner started his job on January 12, 2004, Dr. Lutz terminated him on January 21, 2004. The "out of state fees waiver" was removed by Respondents since his employment by was terminated and he was put into collections by UMR.

There was no legitimate reason to terminate Petitioner's employment. After the termination of Petitioner, Dr. Sinn, Chairman of the Chemistry Department, emailed the administration members of UMR, including Respondent Lutz, expressing his shock, and inquiring about the cause(s) of Bakhtiari's termination. In this email, Dr. Sinn one of Bakhtiari's immediate supervisors wrote "*Was or is Alireza Bakhtiari accused of something?*"

Dr. Van De Mark, Bakhtiari's academic advisor, emailed the Dr. Sinn and Defendant Lutz and expressed his shock, inquired as of the causes of termination and expressed his opinions on Bakhtiari's high performance, his termination and due process rights.

The only place on the record which provides causes of termination for Petitioner is Respondent Lutz's self-serving affidavit to the District Court. She states in her affidavit that (1) *she received reports that* Bakhtiari had written anonymous emails to a girl on the campus, (2) *she received reports that* Bakhtiari had been dishonest in some statements to university officials, (3) *she received reports*

that Bakhtiari had been disrespectful to female peers in front of the students, (4) *she received reports that* Bakhtiari had exhibited a bad temper on campus, (5) *she received reports that* Bakhtiari had been investigated by the FBI about inappropriate emails to a girl in Iran.

The District Court erroneously concluded that regardless whether Petitioner had committed the above actions or not, the above reports are serious allegations and such concerns are good enough for a reasonable juror to infer a valid cause of termination.

Defendants have never presented **any evidence** that any such reports **actually existed**. Defendant Lutz's own affidavit testimony is not evidence. Defendants carry the burden of showing to the Court that such concerns, allegations and as Defendant Lutz claims *"reports"* had ever existed. Defendants have not met their burden.

In fact, there is no truth to any of the purport reasons. The most glaringly deficient reason is number 5 because, and Defendants will concede this, there were no emails to Iran or any FBI investigation. Further, during his time at UMR, Bakhtiari never had a single conduct violation against him or any criminal charges brought. The "reasons" for Bakhtiari's termination are all without any basis in reality.

Furthermore, Bakhtiari presented an abundance of evidence that his reputation was good refuting the unsupported testimony of Defendant Lutz. The evidence submitted by Petitioner suggested that he was professional, pleasant, had good manners and superior teaching performance. In addition to the students, UMR campus employees and staff testified about Bakhtiari's personal and

professional demeanor.

The District Court stated that the threat of taking the discrimination in grade appeal process to the USDE Civil Rights Office, and any related complaints are not consonant with protected activity under Title VII.

Spoliation

An examination of the timeline of events leading up to the destruction of Petitioner's email account reveals that Respondents were clearly responsible for such destruction:

- **January 22, 2004:** Bakhtiari was detained by the Department of Homeland Security ("DHS"), UMR became the sole custodian of the account on this day.

- **February 05, 2004:** Bakhtiari's email account and his access to IT utilities were frozen.

- **February 25, 2004:** Bakhtiari was released by the DHS and returns to campus and requests access to his email and IT account. This request is summarily denied by Respondents.

- **March 15, 2004:** Bakhtiari withdrew from his student status on the campus of UMR.

- **April 26, 2004:** An EEOC complaint was filed and UMR was informed the same day.

- **May 19, 2004:** Bakhtiari's email account and IT account are deleted entirely by the Respondents.

- **Period of March 2004 until August 2004:** Through phone calls and letters, Bakhtiari continually requested that UMR IT preserve his evidence

- **August 2004:** Bakhtiari files the Complaint in with the District Court

- **June 13, 2005:** Motion Hearing at the District Court,

for the first time Bakhtiari *(who was pro se at the time)* was informed of the elimination of his account.

On or about April 16, 2004, Petitioner filed a complaint with the EEOC in St Louis. He informed the Respondents of the complaint on that date. On May 19, 2004, Defendants intentionally deleted all of Bakhtiari's emails per the affidavit of Brian Buegge-UMR IT employee.

On February 05, 2004, Respondents froze Petitioner's access to his computer email account (addressed and identified as abcm8@umr.edu), his computer-network storage area "S Drive" and all computer facility-resources at UMR. Respondents also directed that the account be preserved until at least February 2005. At the time of Respondents' action, Bakhtiari was actively enrolled at UMR. On or about February 25, 2004, he visited the Information Technology ("IT") Help Desk at UMR in person and requested an explanation for the freezing of his computer account. He was verbally assured that his account would be preserved, and he was provided a written IT ticket, which further assured him that the computer account was to be preserved until at least February 17, 2005. Bakhtiari was told that proper preservative steps had been taken (including flagging actions as the evidence shows) by the UMR IT Staff to preserve his electronic data. He was told that because of the major importance of the contents of his computer account (specifically due to involvement of the Department of Homeland Security) even the routine memory recycling processes would not eliminate the evidence.

Bakhtiari continually contacted the UMR IT department for certainty and assurance of the preservation. These contacts were so persistent that it was widely known to the

UMR IT staff that Bakhtiari's electronic evidence was of major importance. The are documents which are a collection of emails authored by the UMR-IT staff (and other UMR officials) about Bakhtiari's persistence relating to the preservation of the evidence. These Exhibits which were disclosed to Petitioner pursuant to Defendants' Rule 26 disclosures; also demonstrate that the UMR IT staff conferred with the Respondents' General Counsel's Office with regard to preservation of this evidence *("..I have got to find out what Jeannie heard from legal . . . ").*

On June 8, 2004, Bakhtiari demanded access to his email accounts. The certified letter requests that Respondents provide a written explanation of their action of freezing of the Petitioner's computer account and a repeated request for preservation. Respondents' response does not include any reason why Bakhtiari's account was frozen and does not make any reference to the preservation of the account. Further, their response does not clarify the status of the evidence and Bakhtiari's computer account. Instead, the response advises him to present his further correspondence to the Enrollment Management Department (Dean Goff, Dean of Enrollment), which is quite surprising, out of the ordinary and atypical since enrollment department has nothing to do with preservation of Bakhtiari's evidence. Bakhtiari wrote a certified letter to the Dean of Enrollment and Scott Yoest (UMR-IT) to pursue the status of his IT-account. Per Respondents' Interrogatory responses, they did not respond to this letter.

An events summary was disclosed to Petitioner by Respondents' counsel in answer to Petitioner's request for production of documents. The last paragraph of this summary sheet corroborates Bakhtiari's repeated requests for preservation and also evinces that Bakhtiari's efforts to

gain access to his electronic evidence intensified in April 2004 (on or after filing his complaint with the EEOC).

Despite the one year hold that had been placed upon Bakhtiari's account on February 17, 2004 by Jeff Jones directing the account be flagged as VIP and preserved until February 17, 2005, on May 19, 2004, Respondents intentionally deleted all of Petitioner's electronic evidence per Affidavit of Brian Buege. It is remarkable that Respondents' deletion of Bakhtiari's email was confirmed by their own employee. The only emails ever produced by the Respondents were junk emails accumulated in Bakhtiari's account after February 2004.

Respondents are very inconsistent in their explanations for eliminating the email account:

- They have no explanation for what happened to the content of the account between January 22, 2004 and February 5, 2004
- They have not explained why they refused to release his account and his access to UMR IT utilities when he returned to the campus on February 25, 2004
- They maintain that Petitioner's computer account was VIP flagged so it would not be eliminated by the system's automatic maintenance and would be preserved until February 17, 2005. Later, their plan changed, the VIP flags were removed, and the whole content of the account was eliminated on May 19, 2004. The reason for the change in plan, they contend, was to give Petitioner access to JoeSS. But Bakhtiari in fact was never given access to JoeSS. Nowhere in the record is there any evidence, showing that Respondents informed Bakhtiari of his access to JoeSS or giving him a

user-ID and password to log-on to JoeSS. Bakhtiari even today does not have access to JoeSS.

- Circumstantial evidence of close time proximity between spoliation and Petitioner filing with EEOC exists.
- All UMR students other than Bakhtiari were given access to their email account for six months after leaving the UMR, but Bakhtiari
- After withdrawal from the university, Petitioner made several phone calls and sent two certified letters to UMR, requesting for preservation of his electronic evidence. None where responded to.
- Respondents violated many of their own policies in freezing, with-holding and eliminating the email account.

In their response to Bakhtiari's spoliation motion, Defendants never address what happened to Petitioner's electronic data – except they claim it was preserved and produced. Respondents have never attempted to retrieve the "other half" of Petitioner's emails which presumably reside in the accounts of Defendant Lutz, Dr. Sinn, Dr. Hoiness or any of the other actors in this lawsuit. As a result of Respondents' efforts, the electronic data has been deleted, or at least made unavailable to the Courts and Petitioner.

In absence of Petitioner's network account, the possibility of any forensic investigation on his computer account and correspondence and authenticating emails does not exist. Respondents do provide two CD's which are literally empty from discovery point of view, since they only include hundreds of junk mail and only 10 emails which are not able to be authenticated since they are on a

CD and not on the network. Therefore, the only one to blame for the Bakhtiari-Lutz correspondence missing is the University of Missouri. And Respondents can not even provide expert forensic testimony to defend themselves because the email account has been eliminated.

On August 4th, 2004 Bakhtiari filed a Title VII complaint with the US District Court of Eastern Missouri (in *pro se*). Bakhtiari asserted a Motion for Sanction for Spoliation of Electronic Evidence, he requested for remedy for the evidentiary prejudice he was suffering in the proceedings and he requested for Sanction against the spoliator who did so intentionally. On August 11, 2006 the District Court entered an order denying the above two requests, since "the Court found no evidence of intent" (See Pet. App.-1).

After three times rescheduling the trial date, and while the parties were in preparation and submitting of their pre-trial briefings, On September 15, 2006 the District Court entered an order granting summary judgment to Respondents on all counts. The state claims were dismissed by the virtue of 11th Amendment Immunity and the Title VII count was dismissed since the District Court believed Bakhtiari had opposed Lutz in his student capacity and not in his capacity as Dr. Lutz's employee. Therefore his complaints to Dr. Lutz and appeal to the US Department of Education – Civil Rights Office would not establish a Title VII protected activity. Notice of Appeal was filed by October 11, 2006 and Bakhtiari appealed to the 8th Circuit's Appellate Court.

The 8th Circuit affirmed the above decision for the same reasons (Opinion dated November 15, 2007. See Pet. App.-33).

SUMMARY OF ARGUMENT

Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment. Section 703 defines in detail the various forms of discrimination on the basis of race, color, religion, sex, and national origin that are prohibited as "unlawful employment practices" to employers, labor organizations, employment agencies, and joint labor-management committees. Section 704, at issue here, creates a different kind of protected class: It declares it an "unlawful employment practice" for any of the foregoing entities to "discriminate against" those who oppose certain practices as unlawful, or who commence or participate in proceedings against the employer. These are so-called retaliation claims.

Courts have cast their interpretations inclusive, to include various actions that employees take to secure their constitutional rights with their employers as protected activities and protected by Title VII.

This Court clarified at *Burlington Northern & Santa Fe Ry. Co. v. White*, 126 S. Ct. 240 (2006) that the lower Courts should cast their review of the conducts of employers, wide enough to make certain that employees obtain the most protection possible from Title VII, and mainly from the provisions of the underlying Act of Congress.

There is dual mentality existing among the circuits for reviewing the evidence and directing the proceedings when pieces of relevant evidence which were known to exist, no have gone missing. If the evidence of bad intent is apparent and persuasive enough, a monetary, judicial or evidentiary punishment is suggested against the wrong-

doer. Some circuits look at this issue first and this is the only issue they look at. Some primarily look at leveling the litigation grounds between two parties so the non-spoliating party would not receive further harms. Possibly punishing a possible wrong-doer come at last.

The two very distinct factors which the lowers courts have erroneously interwoven are the state of mind of the spoliator and the prejudice to the spoliation victim. Courts should not combine these two factors. See *Martin v. Intex Recreational Corp.*, 858 F. Supp. 161, 163 (D. Kan. 1994).

In the current case, the lower courts not only decided to be silent about the over-whelming evidence which exists evincing of intent in spoliation, but also ignored to address the prejudice which the non-spoliator suffers.

The Spirit of the Act of Congress

The Honorable US District and the 8th Circuit Appellate Courts both read the Act of Congress on the face value rather than approaching this Act from a fundamental point of view. The Civil Rights Act of 1964 was a landmark legislation in the United States that initially outlawed segregation in the US schools and public places which was its primary purpose. In the case at bar, the lower Courts have focused on a purely semantic take from one paragraph of the Act.

The ruling that "the employee needs to pursue a narrowly work related complaint to be covered by the anti-retaliation provision of this Act, otherwise, employee has lost the protection afforded by the Congress" completely nullifies the essence of this Act. The purpose of the

Congress was not to provide employers with a path to find escape-goats out of this Act or to help carve an escape maze around it. The purpose was to make school and work place atmosphere discrimination and retaliation free, as much as possible. This Honorable Court realized and honored this very essence in its ruling at *Burlington*.

The United States is home to thousands of institutions that engage individuals in research and academic activities, while employing them and relating to them in a labor context. Relying on the dichotomy or trichotomy of the roles of the persons of authority above these types of employees and therefore stripping these employees from the protection of this Act is unconstitutional.

Even with a shallow read

The Act considers petitioner's action protected activity, even when read on the surface.

Section 704(a) of the Act provides:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, **or participated in any manner** in an investigation, proceeding, or hearing under this subchapter.

Racial discrimination has been called unlawful under this act, therefore complaining to Dr. Lutz about it and taking the matter to higher offices (such as USDE-Civil Rights Office) is a protected activity, even though, in the first glance, it might appear that Dr. Lutz received the complaint in her academic role and then made the damaging decision and took the culpable retaliatory action in a switched role.

Petitioner was deposed (while litigating in *pro se*) on May of 2005. The following exchange occurred during the deposition:

> Question: And this grade appeal had nothing to do with your graduate assistantship, correct? It was just about.
>
> Answer: Yes, the class.
>
> Question: The class and your role as a student in the class.
>
> Answer: Yes.

(Questions by Mr. Phil Hoskins Defense Counsel, Answers by Plaintiff Alireza Bakhtiari, present in the deposition *pro se*).

The above exchange has become one of the main reasons for the 8th Circuit to rule the way it did. The grade appeal had nothing to do with petitioner's job at first, but the consequences of Dr. Lutz's discriminatory treatment of the appeal process, affected petitioner's job and career, in the way that he could not promote chemistry and related fields among his students "while he had a low grade on his own list". Petitioner whole-heartedly believed this destructive consequence on his job and career, while he was complaining to Dr. Lutz, this was emailed to her several times. Therefore, petitioner's internal complaint

was job related and a protected activity. See *Oncale v. Sundowner Offshore Services, Inc.*, 523 U. S. 75, 81 (1998) (Title VII "forbids only behavior so objectively offensive as to alter the 'conditions' of the victim's employment").

Furthermore, the 7th Circuit explained at *Sitar v. Ind. Dep't of Transp.*, 344 F.3d 720, 727 (7th Cir. 2003):

> "The employee "need not use . . .magic words" such as "'gender discrimination'" to garner this protection."

5th Circuit, in *Doe v. A Corp.*, 709 F.2d 1043, 1047-48 (5th Cir. 1983) explained the protected activity in line with such nature for an employee's internal complaint:

> "Determining whether particular conduct constitutes activity protected under §704(a), said the Fifth Circuit, requires balancing: the employer's right to run his business... against the rights of the employee to express his grievances and promote his own welfare."

Courts have had variety of reads from Title VII, but the ruling has been in alignment with the purpose of the Act and not the semantics of it. See *Sanders v. N.Y. City Human Res. Admin.*, 361 F.3d 749, 755 (2nd Cir. 2004):

> "Title VII makes an employer liable for discriminating against its employees based on [protected categories such as] race or gender, or for retaliating against an employee for having challenged such discrimination."

See also *Roberson v. Alltel Info. Servs.*, 373 F.3d 647, 655 (5th Cir. 2004):

> Title VII's antiretaliation provision makes it "an unlawful employment practice for an employer to discriminate against any of his employees . . . because [the employee] has opposed any practice made an unlawful employment practice by this subchapter . . ."

Banks v. E. Baton Rouge Parish Sch. Bd., 320 F.3d 570, 575 n.5 (5th Cir. 2003):

> "or because [the employee] has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter".

Characteristics of Petitioner's Protected Activity

To prove that he engaged in protected activity, the petitioner need not establish that the conduct he opposed was in fact a violation of Title VII. *Davis v. State University of New York*, 802 F.2d 638, 642 (2nd Cir. 1986). However, he demonstrated a "good faith, reasonable belief that the underlying challenged actions of the employer violated the law." See, e.g., *Abel v. Bonfanti*, 625 F.Supp. 263, 267 (S.D.N.Y. 1985); *Francoeur v. Corroon & Black Co.*, 552 F.Supp. 403, 412 (S.D.N.Y. 1982).

The evidence on the record shows that Dr. Lutz spread the news of petitioner's termination in her office and through her staff and sent them up-dates on how petitioner's life was getting harder and harder on the campus and after leaving the campus. The evidence clearly evinces of Dr. Lutz's deterring and intimidating state of mind. The purpose was clearly to deter any further complaints from her staff or any other member of academia. This nature of petitioner's activity, make it a protected one under that Act. See *Burlington*. The only

ultimate decision which should exist under section 704(a) is the ultimate decision left to the fact finder who must determine whether the harm imposed by the employer stifles protected activity.

The Opposition Clause: *"Objective Reasonableness" Requirement*

Plaintiff has established his protected status by demonstrating that he had a "reasonable belief" that the employer was engaged in unlawful employment practices, regardless of whether it was, See *Payne v. McLemore's Wholesale & Retail Stores*, 654 F.2d 1130 (5th Cir. 1981) cert. denied, 455 U.S. 1000, 102 S.Ct. 1630, 71 L.Ed. 2d 866 (1982).

It is critical to emphasize that petitioner has met the burden under this standard has both a subjective and an objective component. Petitioner not only showed that he subjectively (that is, in good faith) believed that his employer was engaged in unlawful employment practices, but also that his belief was objectively reasonable in light of the facts and record presented. See *Little v. United Technologies*, 103 F.3d 956, 960 (11th Cir. 1997).

Retaliation does not need to be based on any actual discrimination; rather, the employee alleging retaliation must have a reasonable belief that he has been discriminated against. See *Petitti v. New England Tel. & Tel. Co.*, 909 F.2d 28, 33 (1st Cir. 1990) (noting that the violation does not have to be discrimination in fact—merely a reasonable belief that a violation of Title VII occurred); *Manoharan v. Columbia Univ. Coll. of Physicians & Surgeons*, 842 F.2d 590, 593 (2nd Cir. 1988) (finding that the conduct complained of does not actually

have to be a violation of Title VII, but "the plaintiff must have a 'good faith, reasonable belief'" that a violation occurred (quoting *Abel*).

At *Clark County School District v. Breeden*, 532 U.S. 268 (2001) the Court discussed the opposition clause and noted the Ninth Circuit's interpretation that the opposition clause applies "to practices that the employee could reasonably believe were unlawful."

In this case, the record shows (and it would evince more clearly and more vividly, had respondents not spoliated a considerable mass of electronic evidence) that petitioner **adamantly, with sincere and reasonable belief** pursued the correct due process of the grade appeal and his rights under those due process rights via emails, letters, phone calls and various messaging means to respondent Dean Lutz, from 2002 until the day of his termination.

The Participation Clause

Participation in any investigation or proceeding concerning a discrimination claim is protected, regardless of whether the allegations set forth in the charge were reasonable or made in good faith, See *Proulx v. Citibank, N.A.*, 659 F. Supp. 972 (S.D.N.Y. 1987).

On the morning of January 21, 2004, Bakhtiari wrote an email to Dr. Lutz, stating to her that he had made an appointment on the phone with the USDE-Civil Rights Office in Kansas City-Missouri, and he stated to her that "he was tired of her roller coaster to the favor of Dr. Long, dragged for almost two years" and the matter was being forwarded to them on the next day. Afternoon of January 21, 2004, on or about 4 pm, Dr. Lutz send an email to the department chair informing him that she had decided to

terminate Petitioner. The exact same message was carried to her through her secretary (Barbara Palmer) who received the verbal message from Petitioner in a new years eve party on December, 2003. The same message has been emailed to her monthly, to pursue further steps of the appeal. Therefore, Bakhtiari has full-filled the participation.

Statutory protection from retaliation extends to employees who inform their employer of their intent to participate in a statutory proceeding before doing so. See *Gifford v. Atchison, Topeka, & Santa Fe Ry. Co.*, 685 F.2d 1149, 1155-56 (9th Cir. 1982).

As the U.S. Supreme Court has observed, "[m]aintaining unfettered access to statutory remedial mechanisms" is "a primary purpose" of Title VII anti-retaliation provision. See *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997). Federal courts have interpreted the participation clause as affording broad protection to employees who participate in administrative or judicial proceedings, regardless of the merits or fate of the claim made. See *Abbott v. Crown Motor Co.*, 348 F.3d 537, 542-43 (6th Cir. 2003), and *Booker v. Brown & Williamson Tobacco Co.*, 879 F.2d 1304, 1312 (6th Cir. 1989), and *Jeffries v. Kansas*, 147 F.3d 1220, 1231 (10th Cir. 1998) and *Mattson v. Caterpillar, Inc.*, 359 F.3d 885 (7th Cir. 2004).

Exposing these facts to the light of above ruling and standard stated in *Proulx*, in *Little* and in *Payne* Courts, petitioner has full-filled both the participation clause and opposition clause.

Complaining v. Respondent Relation(s)

In *McMenemy v. City of Rochester*, 241 F.3d 279 (2nd Cir. 2001), the Second Circuit explained that a viable retaliation claim had been stated under Title VII despite the fact that neither party to the alleged harassment was in an employment relationship with plaintiff or plaintiff's employer. The Court stated that the critical issue in assessing whether the protected activity element has been satisfied is whether a plaintiff complaint concerns acts that are prohibited by the Act of congress. If so, making the complaint constitutes protected activity. This rule applies with equal force even if the complaint relates to conduct outside the complaining employee's workplace that does not involve the complaining employee-employer or colleagues. See also *Johnson v. Palma*, 931 F.2d 203 (2nd Cir. 1991), holding the same and cited in *McMenemy*. The court found this interpretation consistent with a primary purpose of the retaliation clause, namely maintaining unfettered access to Title VII remedial mechanisms.

Comparing the instant question with the courts of *McMenemy* and *Johnson*, petitioner has opposed conduct that occurred inside of an employment relationship, therefore engaged in protected activity and can state a viable retaliation claim based thereon.

Reasonable Employee Test

Under Substantive Law - *Moyo v. Gomez*, 40 F.3d 982 (9th Cir. 1994)

Although not specifically called as such, the Ninth Circuit Court of Appeals has recognized what could be described as a "reasonable employee test" for determining whether an opponent's belief is objectively reasonable.

Moyo v. Gomez involved a prison employee who claimed that he had been disciplined for his refusal to follow an alleged prison practice of denying black prisoners showers after work while granting them to white prisoners. Believing he had opposed an unlawful employment practice, the employee brought a claim of retaliation under Title VII. The 9th Circuit explained:

> "First, if *Moyo* can show that he was discharged for refusing to carry out or otherwise protesting the defendants' alleged policy of denying showers to black inmates after work shifts, he has stated a retaliation claim based on an unlawful employment practice.... Second, regardless of whether the inmates in this case actually qualified as employees, *Moyo* would be able to state a retaliation claim if he could show that his belief that an unlawful employment practice occurred was "reasonable". If *Moyo* reasonably believed that the inmates were protected by Title VII, then his opposition to their treatment would be a statutorily protected activity. The reasonableness of *Moyo's* belief that an unlawful employment practice occurred must be assessed according to an objective standard-one that makes due allowance, moreover, for the limited knowledge possessed by most Title VII plaintiffs about the factual and legal bases of their claims. We note again that a reasonable mistake may be one of fact or law. We also note that it has been long established that Title VII, as remedial legislation, is construed broadly. See *Davis v. Valley Distributing Co.*, 522 F.2d 827 (9th Cir.), cert. denied, 429 U.S. 1090, 97 S.Ct. 1099, 51 L.Ed.2d 535 (1977). This directive applies to the

> reasonableness of a plaintiff's belief that a violation occurred, as well as to other matters."

Shedding the same kind of light on the instant case, as the existing record shows (and the eliminated record could further clarify) Petitioner communicated to Lutz for two years, stating his belief (reasonable believe formed on good-faith) that she was discriminating between him and Long based on race and status, and this was discriminatory treatment was affecting his job as a university employee. He could not promote chemistry among students and encourage them to join chemistry, biology and chemical engineering, while he had a grade of "C" (even though wrongfully assigned) on his own grades list. In one of his emails to Lutz (no produced by Defendants) he states that "he did not have any credibility among his students as a chemistry instructor and advocate to the field of chemistry, while the "C" was on his grades list!". Petitioner asserted in his briefings to the District Court and the Appellate Court that advocating to promotion of chemistry related fields among undergraduate students have been Petitioner's career purpose in teaching as a Teaching Assistant from 2002 to 2004.

Employees will seldom possess the legal or factual knowledge to claim discrimination with certainty. Assigning due deference to this reality by calibrating the measure of reasonableness to the level of understanding determined to be possessed by the "reasonable employee" will prevent actual unlawfulness of the opposed employment practice from becoming the threshold for protection under the opposition clause.

Spoliation of Electronic Evidence

Spoliation of evidence encompasses an array of behavior and intent. Evidence can be spoliated innocently, negligently, recklessly or intentionally. In each instance, without regard to the spoliator's state of mind, the unavailability of the evidence for inspection or trial is equally prejudicial to the non-spoliator.

Courts refer to spoliation of evidence by many ways: "wrongful disposition of evidence, loss of chance, loss of opportunity to litigate, and interference with a prospective civil advantage...". Regardless, spoliation represents "a form of cheating, which blatantly compromises the ideal of the trial as a search for truth."

The ultimate goal of sanctioning spoliation is to promote justice by discouraging the destruction of evidence and by compensating injured parties. See *Patton v. Newmar Corp.*, 520 N.W.2d 4, 7 (Minn. Ct. App. 1994) ; *Bright v. Ford Motor Co.*, 578 N.E.2d 547, 549 (Ohio Ct. App. 1990).

Although courts resort to different remedies based on the facts of a particular case, they agree that it is proper to impose the least severe sanction consistent with remedying prejudice. See *Gates Rubber Co. v. Bando Chem. Indus., Ltd.*, 167 F.R.D. 90, 106 (D. Colo. 1996); *Transamerica Ins. Group v. Maytag, Inc.*, 650 N.E.2d 169, 171 (Ohio Ct. App. 1994).

The 1st Circuit at *Anderson v. Beatrice Food Co.*, 900 F.2d 388, 395 (1st Cir. 1990) explained: "judges must be careful to tailor the remedy to the problem, and 'take pains neither to use an elephant gun to slay a mouse nor to wield a cardboard sword if a dragon looms.'"

In the instant case, the lowest threshold of sanction against Defendants would be simply allowing the fact-finder, and not the judge, evaluate the over-whelming evidence existing in regards to spoliation, including Defendants' mind-blowing inconsistencies in their explanations for their spoliation actions, and see if it would rise inference of intent. A District Court's findings of fact are reviewed for clear error. See *Amtrust, Inc. v. Larson*, 388 F.3d 594, 600 (8th Cir.2004). Petitioner has lost emails because of Respondents' spoliation. He could be more assertive in supporting the substantive legal analysis of his protected activity had he have access to his emails exchanged between Dr. Lutz and him. Whether or not the Court would like to punish the University of Missouri for their actions, the playfield should be even between the spoliator and the non-spoliator.

The Court at *Travelers Ins. Co. v. Dayton Power & Light Co.*, 663 N.E.2d 1383, 1387 (Ohio C.P. 1996) explained: "[w]here the loss of evidence is belated, a court should not dwell on intent but focus on the importance of information, legitimately sought, that is unavailable as a result of the destruction of evidence."

The two very distinct factors which the lowers courts have erroneously interwoven are the state of mind of the spoliator and the prejudice to the spoliation victim. Courts should not combine these two factors. See *Martin*.

The court possibly could, at first, determine the proper remedy to redress any prejudice caused by spoliation. This analysis should not take into account the state of mind of the spoliator. The second inquiry concerns whether to sanction a culpable spoliator for wrongful conduct. State of

mind is the key element in this inquiry. It is important to keep these **logically distinct** inquiries separate.

The petitioner has shown that the following elements exist: (1) a duty to preserve relevant, or potentially relevant, evidence (which Defendants themselves had admitted to, they even promised to preserve the evidence for at least a year, but evidently they changed their mind) (2) destruction of evidence, or alternatively, failure to preserve that evidence (3) some prejudice to the non offending party.

Therefore the court should have advised a remedy, focusing solely on resolving prejudice to the non-spoliator, within array of actions (not necessarily sanctions, i.e. possible inference instructions, which would require a trial) available. Whatever remedy is ultimately imposed, the state of mind of the spoliator is simply irrelevant to the overriding purposes of fairness to the victim, institutional integrity, and deterrence.

Question of Intent in Spoliation

The intent of the spoliator in destroying or altering evidence can be inferred from the surrounding circumstances. In other words, intent can be inferred from the fact that the evidence was destroyed prior to the commencement of any litigation against the [non-spoliator] and there is only a potential for litigation. Therefore, the [spoliator] is under a duty to preserve evidence which it knows or reasonably should know is relevant to the action. *Cincinnati Ins. Co. v. General Motors Corp.*, No. 940T017, 1994 Ohio App. LEXIS 4960, at *9 (Oct. 28, 1994). In the current case, even the University employees told each other that the lawyers are involved and the advice of the "UM Legal" was necessary. But the evidence was destroyed and

very self-contradictory reasons are being given by the University of Missouri.

In the current case, the lower courts have stated that, the evidence of culpable state of mind and intent is not clear to them among the evidence, but they do not address the fact that, regardless, intentional or negligent, Petitioner has been prejudiced to some extent by Respondents' action. The evidence is to be seen as a whole and the jury should see and infer based on that.

In *Dillon v. Nissan Motor Co., Ltd.*, 986 F.2d 263 (8th Circuit, 1993), a case in which the Plaintiff clearly eliminated the relevant evidence, the Eight Circuit explained that this action by Plaintiff *(Dillon)*, should have been at least evaluated by the jury:

> "The instruction did not require that the jury infer the evidence was unfavorable to the *Dillons*, it stated that the jury "may infer that the evidence is unfavorable to the party who could have produced it and did not." (Emphasis added).

Defendants first stated that they have flagged the account so it would not be wiped off by the document retention procedures, then later on, contradicted that "it was eliminated in a document retention procedure!". However, this Honorable Court has already seen such issue at *Arthur Andersen LLP v. United States* 544 U.S. 696, 704, 125 S. Ct. 2129, 161 L. Ed. 2d 1008 (2005); *Hynix Semiconductor, Inc. v. Rambus, Inc.*, 2006 U.S. Dist. LEXIS 30690, 2006 WL 565893, *20 (N.D. Cal. 2006) (unpublished):

> "In contrast, however, a document retention policy adopted or utilized to justify the

> destruction of relevant evidence is not a valid document retention policy," and "[i]t follows that implementing such a policy in advance of reasonably foreseeable litigation would not be proper and could constitute spoliation."

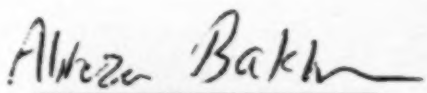
In *Bass v. General Motors Corp.*, 150 F.3d 842, 851 (8th Circuit 1998), the 8th Circuit explained, particularly for the cases involving spoliation issues:

> " In addition to our deferential standard of review, "[t]here is a strong policy favoring a trial on the merits and against depriving a party of his day in court." *Baker v. General Motors Corp.*, 86 F.3d 811, 817 (8th Cir.1996); *Fox v. Studebaker-Worthington, Inc.*, 516 F.2d 989, 996 (8th Cir.1975). This policy rests upon the recognition "that the opportunity to be heard is a litigant's 'most precious right and should be sparingly denied.' " *Baker*, 86 F.3d at 817 (quoting *Edgar v. Slaughter*, 548 F.2d 770, 773 (8th Cir.1977))"

CONCLUSION

The judgment should be reversed.

Respectfully submitted,
March 12, 2008



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No. 07A620

IN THE
Supreme Court of the United States

Alireza Bakhtiari,
Petitioner,

v.

Dr. Paula M. Lutz (in her official capacity) and
University of Missouri (corporate entity),
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

APPENDIX TO PETITIONER'S BRIEF

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Appendix 1

Unpublished Decision

United States District Court, Missouri,
Eastern Division.

Alireza BAKHTIARI ,
v.
Paula M. LUTZ, et al.

No. 4:04CV01071 AGF.

August, 11, 2006.

MEMORANDUM AND ORDER (DENYING MOTION FOR SANCTIONS FOR SPOLIATION OF ELECTRONIC EVIDENCE)

This matter is before the Court on Plaintiff's motion for sanctions against Defendants for their spoliation of electronic evidence. For the reasons set forth below, this motion shall be denied.

BACKGROUND

Plaintiff Alireza Bakhtiari, an Iranian national and a former graduate student and teaching assistant at the University of Missouri-Rolla, filed this action on August 12, 2004, against various University Defendants. He claims in his second amended complaint that the University's dismissal of him as a teaching assistance on January 21, 2004, violated the anti-retaliation provision of Title VII of the Civil Rights Act of 1964, violated 42 U.S.C. §§ 1981 and 1983, was in breach of contract, and entitles Plaintiff to damages under a theory of promissory estoppel.

Appendix 2

By motion filed on January 3, 2006, Plaintiff seeks sanctions against Defendants for spoliation of electronic evidence. The evidence in question is Plaintiff's e-mail account and "S Drive," which is the data storage drive, both maintained by the University for Plaintiff when he was a graduate student/teaching assistant there, beginning in January 2002. From January 22 to February 25, 2004, Plaintiff was detained by immigration officials. During this period of detention, on February 5, 2004, the University removed login access for Plaintiff's e-mail account. According to Defendants, this was done because Plaintiff's faculty advisor received a phone call the previous day from one of Plaintiff's colleagues, Srinivas Achanta, reporting that Plaintiff had called him from his place of detention, given him Plaintiff's user ID and password, and asked him to delete certain computer documents. The record includes the affidavit of the faculty advisor that he received this call and reported it to the University's Information Technology (IT) Department. Doc. #74-6. Plaintiff asserts that upon his release from detention on February 25, 2004, he spoke to the University IT help desk, asked why his account had been frozen, and was assured that his account would be preserved.

Defendants have presented evidence in the form of affidavits and deposition testimony by individuals directly involved that when login access was removed for Plaintiff's account on February 5, 2004, the entire contents of Plaintiff's e-mail account and S Drive were "imaged, pulled, and burned to a CD." Plaintiff withdrew from the University in March 2004. He had not made any tuition payments for the winter semester of 2004. Plaintiff continued to request access to his computer account with various University employees. The contents of his e-mail account and S Drive were backed-up a second time on April 15, 2004.

Appendix 3

According to the January 23, 2006 affidavit of Brain Buege, Director of Networks and Computing at the University, after the second backup on April 15, 2004, the contents of Plaintiff's S Drive were deleted "as part of the process to move [Plaintiff's] account" to the University "System 'domain.'" The move to the "System domain" was done to restore access to plaintiff to his student records through "Joe SS," while not providing him with access to other university systems. Buege attested that the backup of the S Drive would include materials automatically retained by the university's IT system, unless deleted by Plaintiff, and that the time period covered by automatic retention varied depending upon volume, with the current detention period being three and one-half to four weeks. Buege further attests that on May 19, 2004, Plaintiff's e-mail account was deleted "automatically by the campus' automated systems maintenance."

Thus, Plaintiff's S Drive and e-mail account were no longer preserved in any form except the CDs. Defs.' Ex. 1 (Doc. #74).

On April 26, 2004, Plaintiff filed a charge with the Equal Employment Opportunity Commission (EEOC) related to his position at the University. This charge is not in the record and is only obliquely referred to. As noted above, Plaintiff initiated this action in August 2004. In the context of the action, Defendants turned over to Plaintiff the two backup CDs of his e-mail account and S Drive. Plaintiff maintains that the CDs do not contain the contents of his e-mail account and S Drive as they existed on February 5, 2004, that Defendants intentionally deleted "huge" portions of the contents to deter Plaintiff from pursuing complaints he had against the University, and that

they destroyed the backup copies of the missing data "for good measure."[1]

Plaintiff specifically mentions two missing folders that he had created and used in his e-mail account, one entitled "TA-works" and the other entitled "G.Long Hearings." He maintains that e-mails in those folders related to three complaints he was pursuing against the University as of February 5, 2004: one regarding the University's noncompliance with federal immigration regulations, which resulted in his detention; one regarding a request for initiation of the University's discrimination grievance procedure; and one regarding the grading and teaching policies of one of Plaintiff's teachers, G. Long, which, according to Plaintiff, Lutz knew Plaintiff was going to refer to the Office for Civil Rights of the Department of Education. Plaintiff maintains that he will not be able "to fully prosecute and defend certain aspects" of the present case due to the missing electronic evidence. He asks for sanctions against Defendants in the form of a Court Order entering default judgment in favor of Plaintiff on all counts, precluding Defendants from using any electronic evidence or witness testimony related to electronic evidence, instructing the jury to assume that all evidence that was destroyed would have been adverse to Defendants, and/or assessing a monetary fine.

In response to Plaintiff's motion for sanctions, Defendants deny Plaintiff's charge of intentional

---

[1] At a hearing before the Court held on June 23, 2005, on a discovery motion filed by Plaintiff, Plaintiff suggested that he had located an expert who could review the University computer system to demonstrate deletions or alterations by Defendants, but no such evidence has been provided.

destruction of evidence for the purpose of suppressing the truth. They also offer possible explanations for why e-mails and documents claimed by Plaintiff to have existed are not reflected on the backup CDs, including that Plaintiff may be mistaken that he saved all his e-mails to his S Drive, and that he may have saved them to some other digital storage location, such as a University desktop computer to which Plaintiff had access, as posited by Buege in his affidavit. Defendants also suggest that Plaintiff may have given his user ID and password to another individual who then deleted e-mails or documents prior to February 5, 2004. Defendants refer to the reported phone call by Achanta, to the deposition testimony of Plaintiff's former wife that Plaintiff had once given her his user ID and password, and to evidence that Plaintiff's former wife sent an e-mail from his University account on January 29, 2004, when Plaintiff was in detention.

In reply, Plaintiff declares that he never gave Achanta or his former wife or anyone else the authority or the means to log on to his University account. Doc. # 81-1 at 4. Plaintiff also argues in reply that the destruction of e-mails is no less serious than the destruction of paper documents or other evidence, irrespective of prejudice. Doc. #80-1 at 2.

DISCUSSION

Where spoliation of evidence occurs prior to the institution of a lawsuit, "[a] district court is vested with discretion to impose sanctions upon a party under its inherent disciplinary power." Bass v. Gen. Motors Corp., 150 F.3d 842, 851 (8th Cir. 1998). (citations omitted). The Eighth Circuit has held, however, that before a court may impose sanctions for the destruction of evidence, there must be "'a finding of intentional destruction indicating a

desire to suppress the truth,'" and a finding of prejudice to the opposing party. Morris v. Union Pac. RR, 373 F.3d 896, 901 (8th Cir. 2004) (quoting Stevenson v. Union Pac. RR Co., 354 F.3d 739, 745 (8th Cir. 2004)).

Here, Plaintiff has presented nothing other than his own assertions that the files that do not appear on the CDs did in fact exist when the first CD was made in February 2004. Based upon the record, the Court concludes that the CDs in question reflect the contents of Plaintiff's e-mail account and S Drive as of February 5, 2004. Indeed, the evidence shows that University officials took steps to record the contents of both the email account and the S Drive, because they believed it was in their own interest to do so.

The Court further finds that Plaintiff has not met his burden to demonstrante that the deletion of the actual e-mail account and S Drive on May 19, 2005 and April 15, 2005, respectively, was done in bad faith or for the purpose of suppressing the truth, rather than pursuant to the University's document retention policy or as an inadvertent consequence of restoring access to Plaintiff to "Joe SS." While it is extremely regrettable that Plaintiff's account was deleted from the computer system, upon careful review of the record, the Court concludes that Plaintiff has failed to establish by a preponderance of the evidence any culpable intent on the part of Defendants. Both deletions occurred before this action was filed, and the deletion of the S Drive occurred before Plaintiff had even filed his EEOC complaint on April 26, 2004. See Treppel v. Biovail Corp., 233 F.R.D. 363, 371 (S.D.N.Y. 2006) (the obligation to preserve evidence arises when the party has notice that the evidence is relevant to litigation, "most commonly when the suit has already been filed . . . but also on occasion . . . when a party should have known that the evidence may be relevant to future litigation"). It certainly

would have been better had Defendants overridden the normal retention process, but there is no evidence that failure to do so was in bad faith with regard to the present lawsuit. Cf. Wiginton v. Ellis, No. 02 C 6832, 2003 WL 22439865, at *7 (N.D. Ill. Oct. 27, 2003) (defendant's failure to search for relevant e-mails and prevent their destruction through defendant's regular e-mail retention procedures crossed the line between negligence and bad faith where the failure to search and preserve came after the complaint had been filed and after plaintiff had sent defendant a letter instructing defendant to preserve all relevant e-mails, both sent and received).

Accordingly, sanctions against Defendants are not warranted. See Menz v. New Holland N. Am., Inc., 440 F.3d 1002, 1006 (8th Cir. 2006) (reversing dismissal of case as a sanction for plaintiff's prelitigation destruction of evidence where district court did not first make a finding of "bad faith" on plaintiff's part); Morris, 373 F.3d at 901-02 (holding that district court erred in giving an adverse inference instruction in plaintiff's favor where the district court had found that defendant did not intentionally destroy cockpit recordings prior to litigation, but rather that they were destroyed pursuant to a document retention policy).

In addition, the Court finds that Plaintiff's assertion of prejudice is insufficient and unpersuasive. Plaintiff does not explain how any specific e-mails he allegedly sent or received, of which he does not have copies, are needed for him to fully present his claims in this lawsuit. Plaintiff has not expressly requested an evidentiary hearing on the issues raised in his motion for sanctions, and the Court does not believe that such a hearing is necessary to resolve the matter.

CONCLUSION

The Court can understand Plaintiff's frustration and anger in having his e-mail account frozen and then deleted. This, however, does not provide a basis for the imposition of sanctions against Defendants in the present lawsuit.

Accordingly,

IT IS HEREBY ORDERED that Plaintiff's motion for sanctions against Defendants for spoliation of electronic evidence is **DENIED**. [Doc. #62-1]

/s/ AUDREY G. FLEISSIG
UNITED STATES MAGISTRATE JUDGE

Dated this 11th day of August, 2006.

Appendix 9

Bakhtiari v. Lutz, (unpublished) F.Supp.2d, 2006 WL 2664383, E.D.Mo., 2006.

United States District Court, Missouri, Eastern Division.

Alireza BAKHTIARI ,
v.
Paula M. LUTZ, et al.

No. 4:04CV01071 AGF.

September, 15 , 2006.

MEMORANDUM AND ORDER (GRANTING SUMMARY JUDGEMENT TO DEFENDANTS ON ALL COUNTS)

This matter is before the Court on three separate motions for summary judgment filed by Defendants in this action: Paula Lutz, the Dean of the College of Arts and Sciences at the University of Missouri-Rolla; the Board of Curators of the University; and the Curators of the University, a corporation. Plaintiff Alireza Bakhtiari, an Iranian national, claims that Defendants' decision to dismiss him as a graduate instructor on January 21, 2005, was in violation of the anti- retaliation provision of Title VII of the Civil Rights Act of 1964, in violation of 42 U.S.C. §§ 1981 and 1983, in breach of contract, and entitled Plaintiff to damages based upon promissory estoppel. For the reasons set forth below, the motions for summary judgment shall be granted.

FACTUAL AND PROCEDURAL BACKGROUND

The record establishes that by email dated October 2, 2001, the University offered Plaintiff, who was living in Iran, "a graduate appointment for the 2002 Winter Semester and 2002 Fall Semester" as a Ph.D. candidate and teacher's assistant. The appointment included a stipend and tuition waivers for a total of approximately $17,000 per year. The email noted that a Personnel Action Form ("PAF") would be sent to Plaintiff for him to sign and return. Doc. #72.3. Plaintiff's Immigration form I-20, signed by the University's International Student Advisor, noted that Plaintiff was expected to complete his studies by December 31, 2006, the normal length of study for a Ph.D. being five years. The form showed both estimated costs and estimated income for an academic year as approximately $17,000. Doc. #72.7. By letter dated November 12, 2001, the chairman of the University's Chemistry Department wrote to the United States Embassy in Turkey that Plaintiff would participate in training to prepare him for the teaching part of the Ph.D. program. Doc. #72.4.

Plaintiff arrived on campus in January 2002 and began his studies and teaching duties. The record contains an "Appointment Notification" signed by Plaintiff and a representative of the University in mid-January 2002, showing an employment begin date of January 11, 2002, and a monthly salary, with no end date specified. In August 2002, Plaintiff filed a grade appeal and complaint with Dean Lutz, charging that one of his instructors during the previous semester, who had given him a low grade, had engaged in capricious grading and condoned cheating on examinations.

In October 2003, Plaintiff complained to the International Affairs office of the University regarding compliance with regulations of the United States Department of Homeland Security ("DHS"). There is no

evidence in the record that this complaint asserted any discriminatory conduct. In an email dated October 23, 2003, a person working in the International Affairs office reported to her supervisor that she had met with Plaintiff that morning and discussed with him DHS's "Special Registration" requirements for foreign nationals. The email stated that Plaintiff requested a letter telling DHS that Plaintiff was not notified by the University regarding these requirements. Pl.'s Ex. AC.

In November 2003, a female undergraduate student named Suzanne Judd asked the University's Information Technology ("IT") Department to uncover the identity of an individual with whom she had exchanged emails one year prior and who would not reveal his identity to her. IT reported the matter to the campus police. A police report dated December 2, 2003, states that Judd was uncomfortable about the emails, that she suspected Plaintiff as the sender, and that when Plaintiff was interviewed by the police that day, he admitted to this. The investigating officer noted that from reading the emails he could tell that there was a two-way conversation between Plaintiff and Judd. Plaintiff told the officer that he would identify himself to Judd to dispel her uncomfortable feelings, and the officer deemed the case closed with no further action needed. Pl. Ex. AJ.

On December 16, 2003, Plaintiff interacted with University staff in the Student Affairs office regarding the investigation of the Judd matter. On December 17, 2003, Plaintiff filed a Student Discrimination Grievance with the University's EEO Affirmative Action office, complaining that he had been treated in a derogatory way by University staff at the Student Affairs office.

The first day of classes in the Winter 2004 semester was on January 12, 2004. According to Plaintiff, before classes began, he was assigned the task of redesigning the undergraduate Chemistry curriculum, and he began this task at the start of the new semester. The earliest indication in the record that Dean Lutz did not want to renew Plaintiff's graduate teaching position is an email dated January 15, 2004, stating that she did not believe the University was committed to provide him with funding beyond December 31, 2003. Pl.'s Ex. O. Emails between various University officials in mid- January indicate that Plaintiff was re-enrolled as a student for this semester, and that Dean Lutz was upset upon learning this and upon learning that Plaintiff would continue to be paid by the University's computer system even if a new PAF had not been signed, until he was actively removed from the system.

By email dated January 21, 2004, Dean Lutz stated to the Chairman of the Chemistry Department as follows:

> [Plaintiff] is being taken out of the system even as we speak. [The Vice Provost] and I feel (and the Chancellor agrees) that you should meet with [Plaintiff] and tell him what has been done. This should be handled at the department level. You should never have offered [Plaintiff] (or led him to believe) that there was a [graduate teaching assistantship] in the offing for him under the present circumstances. Until these matters are resolved, we cannot place [the University] in the position of knowing of what he might be capable and yet putting him in a [graduate teaching assistantship] slot.

> I am meeting with [another University official] tomorrow (if possible) to discuss the status of the various grievances and charges, as well as how soon we might see some resolution.
>
> Pl.'s Ex. R.

A few days later, the Chairman of the Department informed Plaintiff of Dean Lutz's decision not to renew his graduate teaching appointment. Despite Plaintiff's requests for an explanation of Dean Lutz's decision, no reason for his termination/nonrenewal was provided to him and his demands for implementation of the "Procedures of Dismissal for Cause" set forth in the University's Handbook were refused.

According to Plaintiff, also on January 21, 2004, he told University officials that he was going to take his complaints about the University to the United States Department of Education and DHS. Plaintiff also asserts that on January 22, 2004, he went with his attorney to the office of the United States Immigration and Customs Enforcement (ICE -- the investigative arm of DHS) "to present case of [the University's] noncompliance." Pl.'s Memo at 4.

The record indicates that Plaintiff was detained by ICE after an Immigration official spoke with Gene Beyer of the University's International Affairs office. The record includes a copy of a fax dated January 26, 2004, from Beyer to an Immigration agent in response to a request for information about Plaintiff. Beyer wrote that Plaintiff's actions in not reporting for the National Security Entry/Exit Registration System (NSEERS) were suspicious. Beyer also wrote that Plaintiff easily erupted into unstable behavior, which caused concern across the campus. Beyer

gave several examples of this, including, but not limited to the assertions that complaints with campus police had been filed against Plaintiff for predatory sexual harassment and stalking of young undergraduate girls, and that at a "campus discipline meeting" in December 2003, in which Plaintiff was being investigated for using campus computers for downloading violent pornography and stalking, Plaintiff's behavior was so violent that campus police believed that "physical actions may be appropriate." Beyer wrote that in light of the above, "our office believes that we should bring this student to your attention."

On February 17, 2004, while Plaintiff was still in detention, the University administration ordered the IT department to freeze Plaintiff's computer account. Plaintiff was released from detention on February 24, 2004, and he returned to campus. He officially withdrew from the University as of March 8, 2004, after demands were made for full tuition payment from him for the current semester. Upon confirmation of Plaintiff's withdrawal, Dean Lutz emailed other officials at the University, "And we all breathe a collective sigh of relief . . . ."

On August 4, 2004, Plaintiff filed this action pro se under Title VII of the Civil Rights Act of 1964. Plaintiff claimed that Dean Lutz terminated his employment as a graduate teaching assistant in retaliation for Plaintiff's initiating an internal formal complaint in August 2002 "about an utterly capricious behavior violating civil rights" and pursuing the complaint until the date of his termination. Plaintiff further claimed that he was also terminated as a Ph.D. student at the University and was being denied access to his computer account there. Plaintiff alleged that the University administration, wrongly claiming that he owed the University money, refused to issue his official transcripts, which he needed in order to obtain a similar

position at another university. Plaintiff sought damages for the alleged resulting postponement of his career by five years.

By Order dated January 20, 2005, the Court granted Plaintiff leave to file an amended complaint, adding a breach of contract claim against the Board of Curators of the University, and on February 22, 2005, he filed an amended complaint.[1] Thereafter, Plaintiff retained counsel, and on August 30, 2005, Plaintiff filed a second amended complaint, signed by counsel. The second amended complaint names as Defendants: Dean Lutz; the Board of Curators of the University of Missouri (the "Board"); and the Curators of the University, a corporation (the "Curators"). In none of Plaintiff's complaints did he assert in which capacity he was suing Dean Lutz. In the general allegations of the second amended complaint, he identifies her as the Dean of the College of Arts and Sciences, and the complaint involves only actions taken in the scope of her official duties. Accordingly, the Court concludes that this suit is against Dean Lutz in her official capacity. See Hood v. Norris, 2006 WL 1913430, at *1 (8th Cir. July 12, 2006) (to state an individual-capacity claim, complaint must either specifically name defendants in their individual capacities or must involve actions taken by the government agents

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[1] The amended complaint was not filed on a form for Title VII actions as the initial complaint had been, and Plaintiff identified his retaliation claim as brought under Title VI. Doc. #24. Defendants moved to dismiss this claim for failure to state a claim, whereupon Plaintiff moved to correct the "typographical error" of his amended complaint referring to Title VI rather than Title VII. This motion was granted.

outside scope of official duties); Murphy v. Arkansas, 127 F.3d 750, 754 (8th Cir. 1997) (same).

In Count I of the second amended complaint, Plaintiff asserts that his discharge on January 21, 2004, was in violation of the anti-retaliation provision of Title VII of the Civil Rights Act of 1964, in that "Defendants ordered Plaintiff's discharge because Plaintiff had continued to pursue his academic and civil rights which are constitutionally protected activities." Count II is brought under 42 U.S.C. § 1981 and claims that Defendants discharged him because he "had continued to pursue his academic rights which are a constitutionally protected activity." Count III asserts a claim under 42 U.S.C. § 1983 for violation of Plaintiff's procedural due process rights in that Defendants refused to provide him with a hearing provided for by University rules and regulations, upon his dismissal.

Counts IV and V are for breach of contract, with Count IV positing breach of an employment contract with Plaintiff covering January 2002 through December 2006; and Count V positing breach of an employment contract covering January 2004 through May/June 2004. In Count VI, Plaintiff claims that he is entitled to damages under a theory of promissory estoppel, in that he relied to his detriment on a promise of employment for five years. Count VII seeks damages for damages for spoliation of evidence. Plaintiff seeks actual damages in each count, and punitive damages as well in Counts I, II, III, and VII.

On December 30, 2005, Plaintiff filed an action in state court against Beyer and the University for libel, slander, and the intentional infliction of emotional distress, based upon Beyer's letter of January 26, 2004, and a phone call to the Special Agent, in which Beyer orally relayed the allegedly intentional lies contained in the letter.

ARGUMENTS OF THE PARTIES

Defendants' Arguments

The three Defendants have each filed a separate motion for summary judgment. The motions are, in large part, identical, with one notable exception being that the Board argues that it is not a legal entity amenable to suit, as is the corporate entity known as the Curators. In his combined response to the three motions, Plaintiff concedes that the University is properly sued through the Curators (as a corporation). Accordingly, the Board shall be dismissed as a party, and henceforth, the term "Defendants" shall refer to Dean Lutz, in her official capacity, and the Curators.

As to Count I, Defendants concede for purposes of the present motions, that Plaintiff sustained an adverse employment action, which they characterize not as a termination of employment, but as a decision by Dean Lutz not to renew Plaintiff's appointment as a graduate teaching assistant. Defendants argue, however, that Plaintiff cannot produce evidence that he engaged in protected activity cognizable under the retaliation provision of Title VII, prior to the non-renewal. Defendants argue that the three internal grievances noted above, which Plaintiff asserted in his deposition as his protected activity, related to Plaintiff's status as a student and not to his status as an employee of the University. Defendants also argue that Plaintiff has not shown a causal connection between any protected activity and the non-renewal. Defendants further assert that as arms of the state government, they cannot be liable under Title VII for punitive damages.

With regard to Plaintiff's remaining claims, Defendants invoke Eleventh Amendment immunity. They also present

arguments specific to the merits of each on the remaining claims. They characterize Plaintiff's claim under § 1981 as encompassing the same elements as his Title VII retaliation claim, and argue that it fails for the same reasons that the Title VII claim fails.

Defendants argue that they are entitled to summary judgment on Plaintiff's § 1983 procedural due process claim (Count III) because Plaintiff did not have a protected property right in being reappointed as a graduate teaching assistant each semester. Defendants point to Section 310.020 A.2.c of the University's Collected Rules and Regulations (the University's "Handbook"), which states that a graduate teaching assistant is a "nonregular" appointment, and to Section 310.020 B.1.c, which provides as follows:

> Nonregular Term Appointments - Nonregular term appointments begin at a specified date and terminate at a specified date. Such appointments are usually for a period of one academic year but may be for a longer or shorter period, except that no single term appointment shall be for a period of longer than three years. No number of nonregular term appointments shall create any presumption of a right to reappointment on term or continuous basis, subject to the limitations described in Section 310.020 A.2.

Doc. #72.13. Defendants have submitted the affidavit of the University's Director of Human Resources (Doc. #72.12), who attests that a graduate teaching assistant whose appointment is not renewed for another term does not have a right to invoke "dismissal for cause" proceedings under Section 310.020 C.2, which provides that term appointees, regular or nonregular, may be

terminated only for cause if termination occurs prior to expiration of the stated term.

Defendants have also submitted the affidavit of Dean Lutz dated January 11, 2006. Dean Lutz attests that graduate teaching assistants are appointed by her to term appointments with a beginning and ending date by means of a PAF, and that Plaintiff's final term appointment was from August 18, 2003, to December 31, 2003. The PAF submitted as an exhibit to Dean Lutz's affidavit is entitled, "Personnel Action Form For Data Entry Purposes Only." It shows an effective date of August 18, 2003, and an end date of December 31, 2003, for Plaintiff as a graduate teaching assistant. Doc. #72.9.

Dean Lutz attests that her decision not to renew Plaintiff's appointment after December 31, 2003, was based upon the following factors: she learned that Plaintiff had admitted to University police that he had sent emails, using an alias, to a female undergraduate student, who was made uncomfortable by them and reported the matter to the police; she received reports from Chemistry department faculty and staff that Plaintiff treated female graduate teaching assistants in a rude manner in front of their undergraduate students; "there had been reports" that Plaintiff had not been honest in statements to Chemistry faculty and International Affairs staff; there were reports that Plaintiff had displayed inappropriate anger as a graduate teaching assistant and with the International Affairs office; and she had heard reports that Plaintiff was being investigated by the FBI in connection with an email sent overseas to a female, with this playing a small part in her decision not to renew Plaintiff's appointment. Dean Lutz stated that her "foremost concern" was that she did not want Plaintiff in a position of authority over undergraduate students. Doc. #72.8.

Defendants raise another argument for summary judgment on Plaintiff's § 1983 claim, namely, that the University is not a "person" within the meaning of § 1983.

Defendants next argue that Plaintiff's breach of contract claims fail because there was never a written agreement to employ Plaintiff beyond December 31, 2003. They argue that the longest appointment ever offered to Plaintiff was a two-semester appointment as a graduate teaching assistant for the Winter and Fall 2002 semesters, when he was accepted to the University. Defendants argue that Missouri's statute of frauds, Mo. Rev. Stat. 432.010, would bar the enforcement of any employment agreement not to be performed within one year, unless the agreement was in writing. They argue that the documents relied upon by Plaintiff -- the recruitment email, the I-20 immigration form, and the letter to the Embassy in Turkey -- do not constitute a written contract for employment beyond the Fall 2002 semester, and that Plaintiff had no contractual rights to employment following the expiration of his term appointment on December 31, 2003.

On Plaintiff's promissory estoppel claim, Defendants maintain that Plaintiff is unable to show that when the University recruited him, it made a promise of employment for five years. Defendants further argue that Plaintiff cannot show detrimental reliance on any such promise, nor resulting injustice. In addition, Defendants rely on Missouri cases which refused to apply promissory estoppel in the employment context where it would frustrate the statute of frauds

Plaintiff's Arguments

In a combined response to Defendants' motions for summary judgment, Plaintiff argues that in filing the internal complaints and informing the University that he was going to present his grievances to the Departments of Education and Homeland Security, he was exercising his constitutional rights and thus these activities were protected activities under Title VII's anti-retaliation provision. Plaintiff also argues that the reasons proffered by Dean Lutz for his termination fail to rebut his prima facie case of retaliation because Defendants have not offered any facts that support the legitimacy of these reasons. He reviews each reason asserted by Dean Lutz in her affidavit, and explains why he believes the reason is pretextual. For example, Plaintiff argues that Dean Lutz's first reason, based upon the emails Plaintiff sent to Judd, is clearly pretextual in light of the campus police report in closing the case.

Plaintiff argues that he can recover punitive damages against the University under the Missouri Human Rights Act (MHRA), Mo. Rev. Stat. 213.010, and that although his complaint does not mention the MHRA, the elements of a retaliation claim are the same under the MHRA and Title VII, and so the Court should construe the complaint to state a MHRA claim. In a footnote, Plaintiff asks the Court alternatively, to permit him to amend his complaint to add reference to the MHRA.

Plaintiff recognizes Defendants' Eleventh Amendment immunity as to Plaintiff's claims for damages, but argues that Defendants waived this immunity by purchasing insurance for employment practices liability, and by statutorily granting the Curators the power to sue and be sued. With respect to his claim under § 1983, Plaintiff argues that he was entitled to procedures set forth in the University's Handbook as an employee who was

terminated before the end of an appointment period, as he began working in the Winter 2004 semester before Dean Lutz terminated him. He also maintains that he had a five-year contract for employment as a teaching assistant, and was terminated before the end of this period. He further argues that he was denied his rights under the Handbook's provision for discrimination grievances filed by students, and that his property rights were violated by Defendants denying him access to his computer account and refusing to release his transcript.

Plaintiff asserts that he has an actionable breach of contract claim based upon a five-year contract from January 2002 through December 2006, or at least for the 2004 Winter semester. Lastly, Plaintiff argues that even if there is no enforceable contract, promissory estoppel provides relief, as Plaintiff came to the United States in reliance upon Defendants' promise of employment while he pursued his Ph.D. He asserts that Defendants broke this promise by terminating him, placing him in deportation proceedings, expelling him from the University without cause, and retaining his transcripts and computer records.

SUMMARY JUDGMENT STANDARD

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment shall be entered "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." In ruling on a motion for summary judgment, a court is required to view the facts in the light most favorable to the non-moving party and must give that party the benefit of all reasonable inferences to be drawn from the record. Tademe v. St. Cloud State Univ., 328 F.3d 982,

986 (8th Cir. 2003). The moving party bears the burden of showing the absence of a genuine issue of material fact. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986).

When a motion for summary judgment is made and properly supported by evidence, the non-moving party may not rest on the allegations of his pleadings but must set forth specific facts, by affidavit or other evidence, showing that there is "a genuine issue for trial." Fed. R. Civ. P. 56(e). "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). Rule 56(c) "mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

DISCUSSION

Title VII Retaliation Claim

Under Title VII, it is unlawful for an employer to "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). Title VII also makes it unlawful for an employer "to discriminate against any of his employees . . . because he [the employee] has opposed any practice made an unlawful employment practice [by Title VII] . . . or because he has made a charge [under Title VII]." 42 U.S.C. § 2000e-3(a).

Because there is no direct evidence of retaliation to support Plaintiff's claims, the burden-shifting analysis set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-03 (1973), applies. See Twymon v. Wells Fargo & Co., ___F.3d___, 2006 WL 2595961, at *9 (8th Cir. Sept. 12, 2006). Under this analysis, the employee must first establish a establish a prima facie case of retaliation by showing that (1) he engaged in statutorily protected activity; (2) the employer took an adverse action against him; and (3) a connection exists between the two occurrences. Id.; Green v. Franklin Nat'l Bank of Minneapolis, ___F.3d___, 2006 WL 2419171, at *8 (8th Cir. Aug. 23, 2006).

If the plaintiff succeeds in establishing a prima facie case, the burden of production shifts to the employer, who must rebut the presumption of retaliation with evidence of a legitimate, nonretaliatory reason for the challenged action. If the employer meets that burden, the employee may prevail by proving by a preponderance of the evidence that the employer's reason was a pretext for intentional retaliation. Twymon, 2006 WL 2595961, at *7; Green, 2006 WL 2419171, at *8. "To prove pretext, a plaintiff must both discredit an employer's asserted reason for termination and show that the circumstances permit drawing the reasonable inference that the real reason for terminating the plaintiff was [retaliation]." Twymon, 2006 WL 2595961, at *8.

"Protected activity" in this context includes opposition to employment practices prohibited under Title VII; however, a plaintiff need not establish that the conduct he opposed was in fact prohibited under Title VII; rather he need only demonstrate that he had "a good faith, reasonable belief that the underlying conduct violated [Title VII]." Green, 2006 WL 2419171, at *8; see also Buettner v. Arch

Coal Sales Co., 216 F.3d 707, 715 (8th Cir. 2000). The "adverse action" equirement covers not only an employer's actions that affect employment or alter the conditions of the workplace, but other adverse actions as well. Burlington N. & Santa Fe Ry. Co. v. White, 126 S. Ct. 2405, 2412 (2006). Nevertheless, this requirement is only satisfied by adverse actions that are "harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination." Id. at 2409.

Here, as an initial matter, the Court notes that Plaintiff never quite states the alleged improper basis for Defendants' allegedly discriminatory conduct which he opposed. The Court will assume that this basis is that Plaintiff is Iranian, which encompasses not just national origin, but also race and ethnicity. See Pourghoraishi v. Flying J, Inc., 449 F.3d 751, 756-57 (7th Cir. 2006). The Court agrees with Defendants that pursuing the grade appeal/teaching grievance did not constitute protected activity under Title VII. Unfairness in grading and poor teaching are not practices which a reasonable person could believe are prohibited by Title VII where the grade in question had no effect on the student's employment status. Thus, complaining about, or "opposing" these matters does not constitute protected activity under Title VII's antiretaliation provision.

The Court arrives at the same conclusion with respect to Plaintiff's complaints to the International Affairs office about the University's alleged noncompliance with immigration regulations, although a somewhat closer question is presented here. Nowhere does Plaintiff explain what the complained-of noncompliance was, or how this alleged noncompliance affected Plaintiff as an employee of the University, such that he could have reasonably believed that the noncompliance was prohibited under Title VII. Nor

does he provide any evidence that he was complaining of an unlawful employment practice based upon his race or national origin. See Hunt v. Neb. Pub. Power Dist., 282 F.3d 1021, 1028-29 (8th Cir. 2002) (plaintiff was not engaged in protected activity, and thus failed to establish a prima facie case of retaliation, where she complained that she was entitled to a pay increase and a change in job title, but did not attribute the failure to give her a raise or a promotion to sex discrimination); Cherry v. Ritenour Sch. Dist., 253 F. Supp. 2d 1085, 1099 (E.D. Mo. 2003) ("complaining of working conditions without attributing the complaints to an illegitimate criterion does not constitute opposition to an unlawful employment action and is not protected activity").

Similarly, the specific conduct complained about by Plaintiff in the December 2003 EEO complaint is not entirely clear. Plaintiff has not provided a copy of the complaint and nowhere asserts that he complained of unlawful work-related discrimination based upon his race or national origin. The only description Plaintiff offers is that he was treated in a derogatory way by University staff at the Student Affairs office on one occasion. The Court concludes that no reasonable person would have believed that derogatory remarks and/or conduct on one occasion by a University official in the Student Affairs office violated Title VII. See Clark County Sch. Dist. v. Breeden, 532 U.S. 268, 271 (2001) (per curiam) (holding that no reasonable person could have believed that a single incident of sexual harassment violated Title VII, precluding retaliation claim based upon internal complaints about the incident); Greene v. A. Duie Pyle, Inc., 2006 WL 694377, at *8 (4th Cir. Mar. 20, 2006) (per curiam) (terminated male employee did not have an objectively reasonable belief that his former employer's actions in allowing sexually offensive materials in the workplace were unlawful, and, thus, he did not

engage in protected activity by reporting the inappropriate material); see also Arraleh v. County of Ramsey, 2006 WL 2561240, at *8 (8th Cir. Sept. 7, 2006) (conduct which engenders offensive feelings in an employee but does not affect the conditions of employment, does not violate Title VII).

Indeed, Plaintiff several times asserts that he was retaliated against for exercising his academic and constitutional rights. This, however, is not prohibited under Title VII. In sum, even viewing the evidence in the light most favorable to Plaintiff, the Court concludes that he was not engaged in "protected activity" under Title VII, and that accordingly, Defendants are entitled to summary judgment on Plaintiff's Title VII retaliation claim.

In addition, the Court concludes that Plaintiff did not show by a preponderance of the evidence that Defendants' proffered reasons for the termination/non-renewal of his employment were pretexts for retaliation. The proper inquiry at the summary judgment stage is whether the decision-maker believed that the plaintiff was guilty of the conduct asserted as the basis for the adverse action. Scroggins v. Univ. of Minn., 221 F.3d 1042, 1045 (8th Cir. 2000); Twymon, 2006 WL 2595961, at *7 (a proffered legitimate, nonretaliatory reason for termination need not, in the end, be correct if the employer honestly believed the asserted grounds at the time of the termination; the question in evaluating pretext is whether the employer honestly believed the employee violated the company's code of conduct, not whether the employer was actually correct in its conclusion).

Evidence of "similarly-situated employees of a different national origin receiving more favorable treatment can demonstrate pretext." Ramirez v. Gencorp, Inc., No. 05-

3825, slip op. at 4 (8th Cir. Sept. 14, 2006). Here Plaintiff presents evidence that in 2001, chemistry graduate students at the University negligently caused an explosion and that the then chairman of the department was convicted of and fined for resisting arrest in connection with a investigation into the explosion, yet the University took no disciplinary action against the students or chairman. Clearly, the chairman of a department and a graduate teaching assistant are not similarly situated in this context, and the students' negligence is not analogous to the reasons Dean Lutz proffered for Plaintiff's non-renewal. Plaintiff also asserts that his teaching evaluations were higher than those of other graduate student assistants who were retained by the University. This, however, is not relevant as Plaintiff was not let go due to poor performance.

Even if Plaintiff's evidence calls into question the ultimate validity of some of the reasons asserted by Dean Lutz for her decision not to renew Plaintiff's appointment, the fact remains that he has not shown that Dean Lutz did not have legitimate nonretaliatory reasons for her decision, or that she was motivated by retaliatory animus. Reaching this conclusion does not involve credibility determinations by the Court, which would be impermissible at this summary judgment stage of the case. For example, even if Plaintiff did not inappropriately lose his temper at the Student Affairs office, there is no evidence to suggest that Dean Lutz did not believe he had. See Mershon v. St. Louis Univ., 442 F.3d 1069, 1075 (8th Cir. 2006) (holding that even if plaintiff did not threaten a faculty member, the University's decision to ban plaintiff from campus for the stated reason that he made the threat, was not a pretext for discrimination, where plaintiff did not dispute that the decision-maker perceived plaintiff's comments to be a threat and had communicated this perception to others), cited with approval in Twymon, 2006 WL 2595961, at *8.

In addition, it is undisputed that an undergraduate student did complain about emails sent to her by Plaintiff without disclosing his true identity, and that the matter was serious enough to cause a police investigation. That Plaintiff elected, as a result of the investigation, to take steps to resolve the matter to the satisfaction of the police in no way suggests that this was not considered a serious matter by Dean Lutz. Nor does the closing of the police case somehow preclude the University from considering this a serious matter and exercising its own options. Accordingly, on this alternative ground of Plaintiff's failure to show pretext, Defendants are entitled to summary judgment on Plaintiff's Title VII retaliation claim.

§ 1983 Due Process Claim

The Court concludes that Plaintiff's claims under § 1983 cannot proceed for two reasons. First, Eleventh Amendment immunity shields the Defendants in this case from a claim for damages in federal court. As noted above, in each complaint, Dean Lutz was sued in her official capacity. A suit against a state official in her official capacity is the same as a suit against the state. Hafer v. Melo, 502 U.S. 21, 25 (1991). And The Curators of the University, as a corporation, was sued, without naming the individual curators in their individual capacities. Thus Eleventh Amendment immunity applies here. See Sherman v. Curators of the Univ. of Mo., 871 F. Supp. 344, 348 (W.D. Mo. 1994) (holding that the University of Missouri is a state instrumentality entitled to Eleventh Amendment immunity), cited with approval in Scherer v. Curators of the Univ. of Mo., 49 Fed. Appx. 658, 659-59 (8th Cir. Oct. 31, 2002) (per curiam); see also Ormerod v. Curators of the Univ. of Mo., 97 Fed. Appx. 71, 72 (8th Cir. May 21, 2004) (per curiam). The purchase of insurance or the granting of

authority to the Curators to sue or be sued does not constitute a waiver of immunity from suit in federal court. See Jackson v. Ga. Dep't of Transp., 16 F.3d 1573, 1584 (11th Cir. 1994) (state agency waived its sovereign immunity to suit in state court to the extent there was insurance coverage, but this did not waive the agency's Eleventh Amendment immunity to suit in federal court); Westinghouse Elec. Corp. v. W. Va. Dep't of ighways, 845 F.2d 468, 471 (4th Cir. 1988) (same); Long v. Curators of the Univ. of Mo., No. 92-0814-CV-W-6, 1993 WL 52821, at *2-3 (W.D. Mo. Feb. 23, 1993) (same).

Second, a state official in her official capacity and a state entity are not "persons" within the meaning of § 1983. See Zar v. S.D. Bd. of Examiners of Psychologists, 976 F.2d 459, 464 (8th Cir. 1992) (citing Hafer, 502 U.S. at 27); Mackey v. Camp, 415 F. Supp. 323, 324 (W.D. Mo. 1976). The Court notes that even after Defendants raised these issues, Plaintiff did not seek to amend his complaint to name (and then serve) Dean Lutz or the individual curators in their individual capacities. Accordingly, Defendants are entitled to summary judgment on Plaintiff's § 1983 claim.

§ 1981, Breach of Contract, Promissory Estoppel, Spoliation of Evidence

The Eleventh Amendment immunity noted above also applies to Plaintiff's § 1981 claim and state law claims for damages. See Sherman, 871 F. Supp. at 348 (promissory estoppel and breach of contract); Singletary v. Mo. Dep't of Corr., 423 F.3d 886, 890 (8th Cir. 2005) (§ 1981; citing cases). Any cause of action for damages for spoliation of evidence that Plaintiff might have against Defendants, see Baugher v. Gates Rubber Co., 863 S.W.2d 905 (Mo. Ct. App. 1993) (discussing circumstances in which such an

action might lie in Missouri), would also be barred in federal court by Eleventh Amendment immunity.[2]

CONCLUSION

Accordingly,

IT IS HEREBY ORDERED that Defendants' motion to strike portions of Plaintiff's Verified Response to Defendants' Statement of Undisputed Material Facts and Supplemental Material Facts is **DENIED**. [Doc. #89]

IT IS FURTHER ORDERED that the motion for summary judgment filed by Defendant Paula Lutz is **GRANTED**. [Doc. #71]

IT IS FURTHER ORDERED that the motion for summary judgment filed by Defendant The Board of Curators of the University of Missouri is **GRANTED**. [Doc. #69]

IT IS FURTHER ORDERED that the motion for summary judgment filed by Defendant The Curators of the University of Missouri is **GRANTED**. [Doc. #67]

IT IS FURTHER ORDERED that Plaintiff's motion for leave to file a memorandum in support of his punitive damages claim is **DENIED as moot.** [Doc. #91]

A separate Judgment shall accompany this Memorandum and Order.

/s/ AUDREY G. FLEISSIG

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[2] The Court notes that by separate Memorandum and Order, the Court denied Plaintiff's motion for sanctions based upon his claim of spoliation of electronic evidence by Defendants.

Appendix 32

UNITED STATES MAGISTRATE JUDGE

Dated this 15th day of September, 2006.

Appendix 33

Bakhtiari v. Lutz,
507 F.3d 1132, C.A.8 (Mo.),2007.

Submitted: June 13, 2007
Filed: November 15, 2007

Before MURPHY, BEAM, and SHEPHERD, Circuit Judges.

BEAM, Circuit Judge.

Alireza Bakhtiari appeals from the district court's [1]adverse grant of summary judgment in favor of Dr. Paula Lutz and the University of Missouri-Rolla (UMR) in this employment discrimination and civil rights case. We affirm.

BACKGROUND

We recite the facts in the light most favorable to Bakhtiari, the non-moving party. Weyrauch v. Cigna Life Ins. Co., 416 F.3d 717, 720 (8th Cir. 2005). In the fall of 2001, the Chemistry department at UMR recruited Bakhtiari, an Iranian national, to be a graduate teaching assistant (TA) and a participant in the Chemistry Ph.D. program. Bakhtiari reported to campus and commenced his studies and work as a TA in January 2002. As part of his Ph.D. studies, Bakhtiari enrolled in an advanced inorganic chemistry course with Dr. Gary Long for the semester beginning in January 2002. Not satisfied with the ultimate grade he received in that course, Bakhtiari filed a grade appeal in August 2002, alleging that Dr. Long excessively

[1] The Honorable Audrey G. Fleissig, United States Magistrate Judge for the Eastern District of Missouri, to whom the case was referred for final disposition by consent of the parties, pursuant to 28 U.S.C. § 636(c).

missed class, mismanaged the course, and graded capriciously. A hearing on the matter was conducted in November 2002, and Bakhtiari's grade remained unchanged after that procedure. Unhappy with this result, Bakhtiari communicated with Dean Paula Lutz on numerous occasions between November 2002 and January 2004 to express his displeasure about the grade appeal outcome and to request further action. Also during this time period, Bakhtiari made complaints to UMR's international affairs office regarding UMR's compliance with Department of Homeland Security (DHS) regulations. In October 2003, a UMR employee within the international affairs office reported to her supervisor that she met with Bakhtiari and they discussed DHS's "special registration" requirements for foreign nationals.

In December 2003, Bakhtiari filed a grievance with UMR's EEO Affirmative Action office, complaining that the student affairs office had treated him in a derogatory manner while investigating his possible involvement with anonymous emails sent to a female UMR student.

During the spring 2004 semester, Bakhtiari, in his position as a TA, was assigned to redesign and re-write the freshman chemistry laboratory syllabus. Classes began on January 12, 2004. However, later that same month, Bakhtiari was informed by Dr. Ekkehard Sinn, Chair of the Chemistry Department at UMR, that UMR had decided to dismiss him as a TA, effective immediately. No official reason for his dismissal was ever given. In February 2004, UMR administration officials ordered the information technology (IT) department to freeze Bakhtiari's computer account.

In March 2004, Bakhtiari officially withdrew as a student because UMR officials demanded full tuition

payment for that semester. Bakhtiari, however, continued to communicate with UMR officials about the status of his email account. Bakhtiari thought that even though a freeze had been placed on the account, the contents of the account would be preserved at least until February 2005, and there is evidence in the record to support this understanding. Nonetheless, UMR officials deleted Bakhtiari's email account in May 2004, but contend that they backed-up the contents of the account onto two CDs before doing so.

Bakhtiari brought this lawsuit in August 2004, alleging that UMR had retaliated against him for his complaints regarding the grade appeal process and for his complaints regarding the immigration and student affairs issues. Bakhtiari also alleged claims under 42 U.S.C. §§ 1981 and 1983, and state law for breach of contract and promissory estoppel. In the course of the litigation, UMR turned over the two CDs containing Bakhtiari's email account information. Bakhtiari contends that while parts of his email account are contained on the CDs, a large portion of the data is missing. Accordingly, Bakhtiari moved for sanctions due to spoliation of evidence with regard to his missing email data. In response, UMR submitted evidence to the district court that after its IT department copied the contents of the email account onto the CDs, the account was automatically deleted by campus automated systems maintenance. UMR also produced evidence that third parties had access to Bakhtiari's account before campus officials froze it, and argued that this could account for any allegedly missing data. The district court denied the motion for sanctions, finding no evidence that UMR acted with intent to destroy evidence.

UMR subsequently moved for summary judgment, which the district court granted. The district court foun that Bakhtiari's prior complaints were not "protected activity"

for purposes of a retaliation cause of action and that in any event, UMR offered legitimate reasons for terminating Bakhtiari's TA appointment. With regard to the section 1981 and 1983 claims and the state law claims, the district court held that because Bakhtiari sued UMR officials only in their official capacities, they were entitled to Eleventh Amendment immunity.

II. DISCUSSION

Spoliation

We review the district court's decision not to sanction UMR for spoliation of evidence for an abuse of discretion. Menz v. New Holland N. Am., Inc., 440 F.3d 1002, 1005 (8th Cir. 2006). A spoliation sanction requires a finding that a party intentionally destroyed evidence with a desire to suppress the truth. Greyhound Lines, Inc. v. Wade, 485 F.3d 1032, 1035 (8th Cir. 2007).

The district court did not abuse its discretion in refusing to sanction UMR for the alleged spoliation of evidence. UMR offered credible IT evidence that it had taken the appropriate steps to back-up Bakhtiari's electronic mail account onto CDs. The district court was entitled to credit UMR's explanations when resolving this evidentiary dispute and motion for sanctions. For example, UMR offered several alternatives as to what might have happened to allegedly missing emails, many of them attributable to Bakhtiari, or his representatives who had access to his email account before it was frozen. UMR also presented evidence that Bakhtiari himself had asked individuals to delete portions of his email account. Furthermore, we agree with the district court that the fact that deletion of his electronic account occurred before this lawsuit was filed further undercuts Bakhtiari's claims that UMR acted with a

desire to suppress the truth. See id. (rejecting argument that "because litigation was likely, Greyhound had a duty to preserve . . . data" and noting that "ultimate focus" for imposing spoliation sanctions is "the intentional destruction of evidence indicating a desire to suppress the truth, not the prospect of litigation"). Under these circumstances, we find that the district court did not abuse its discretion, and Bakhtiari's spoliation argument is without merit.[2]

Retaliation

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[2] In his Second Amended Complaint, Bakhtiari included a claim for Intentional Spoliation of Evidence. In light of our analysis of the spoliation sanctions issue, we conclude that the district court properly dismissed this claim on summary judgment.

Because there is no evidence, direct or circumstantial[3],

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[3] The concurring opinion objects to the use of the word "circumstantial" in conjunction with the word "direct" in the discussion of discriminatory retaliation, vel non. It is respectfully suggested that Supreme Court precedent requires the language used. In this regard, both words are employed in a purely evidentiary context, and not necessarily in the "causal" sense discussed by Chief Judge Loken in Griffith v. City of Des Moines, 387 F.3d 733, 736 (8th Cir. 2004), from which case the term "direct evidence" seems to have taken on a new and broader meaning, possibly one unique to this circuit. See, e.g., Morgan v. A.G. Edwards & Sons, Inc., 486 F.3d 1034, 1042 (8th Cir. 2007). The term "direct evidence," as used, is simply evidence, which if believed, proves the existence of a fact in issue without inference or presumption.

Rowan v. Lockheed Martin Energy Sys., Inc., 360 F.3d 544, 548 (6th Cir. 2004); Black's Law Dictionary 596 (8th ed. 2004). The term "circumstantial evidence," on the other hand, is "proof of a chain of facts and circumstances" indicating the existence of a fact, United States v. Curry, 187 F.3d 762, 767 (7th Cir. 1999) (quotation omitted), or "[e]vidence based on inference and not on personal knowledge or observation." Black's Law Dictionary 595 (8th ed. 2004). In Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), a mixed-motive case as differentiated from a single-motive case under McDonnell Douglas, see Griffith, 387 F.3d at 743, Justice O'Connor, in her controlling concurrence, stated: "[I]n order to justify shifting the burden on the *issue of causation* [of discriminatory animus] to the defendant, a . . . plaintiff must show by *direct evidence* that an illegitimate criterion was a substantial factor in the decision." Price Waterhouse, 490 U.S. at 276 (emphasis added). Congress disagreed with this analysis or at least with some of the numerous lower court interpretations of her articulation. Accordingly, the legislators amended Title VII, revising and reordering liability determinations and damage-finding procedures, at least in a mixed-motive case. Civil Rights Act of 1991, 42 U.S.C. § 2000e-2(m). Subsequently, the Supreme Court, in Desert Palace, Inc. v. Costa, 539 U.S. 90 (2003), analyzed the Act's amendments in relationship to Price Waterhouse, realigning by its opinion burdens of proof and institutional and individual liabilities arising from invidious discrimination in mixed-motive disputes. But what appears to have been lost by the two-judge concurrence in this case are the several basic, and longstanding, evidentiary rules noted and specifically recalled in Desert Palace. Justice Thomas,

"showing a specific link between" Bakhtiari and any alleged retaliatory practices prohibited by Title VII, Griffith v. City of Des Moines, 387 F.3d 733 (8th Cir. 2004), the burden-shifting analysis set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-03 (1973) applies. Under this analysis, the employee must first establish a prima facie case of retaliation by showing the following: (1) he engaged in statutorily protected activity; (2) the employer took an adverse action against him; and (3) a connection between the two occurrences. Green v. Franklin Nat'l Bank, 459 F.3d 903, 914 (8th Cir. 2006). "Protected activity" in this context includes opposition to employment

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writing for a unanimous Court in Desert Palace states "that we should not depart from the '[c]onventional rul[e] of civil litigation [that] generally appl[ies] in [all] Title VII cases.' [Price Waterhouse, 490 U.S. at 253]. That rule requires a plaintiff to prove his case 'by a preponderance of the evidence,' [id.], using 'direct or circumstantial evidence.' Postal Service Bd. of Governors v. Aikens, 460 U.S. 711, 714 (1983)." 539 U.S. at 99 (some alterations in original). Justice Thomas further discusses the sufficiency of circumstantial evidence in civil rights litigation, noting that "[c]ircumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence." 539 U.S. at 100. The concurrence appears to advance the idea that in the face of a motion for summary judgment, a single-motive Title VII case, not supported by "direct evidence" but supported by "circumstantial evidence" tending to show a specific link to prohibited discriminatory practices, may not proceed directly to trial or to dismissal if the proffered evidence is insufficient as a matter of law-but must first, in every instance, be relegated to the McDonnell Douglas three-part presumption of discrimination paradigm. After Desert Palace, this is simply an untenable concept. In Desert Palace, Justice Thomas emphatically put to rest the theory that circumstantial evidence may only serve in a single-issue civil rights case to establish the "presumption of discrimination" upon which the McDonnell Douglas procedure and analysis rely. While circumstantial evidence may, indeed, be used for that presumption-creating purpose, if necessary, it may also be used in the same manner as direct evidence if it establishes an unbroken chain of proof leading to unlawful discrimination. Accordingly, the use of the words "direct or circumstantial" comports with binding precedent.

practices prohibited under Title VII; however, a plaintiff employee need not establish that the conduct he opposed was in fact prohibited under Title VII; rather he need only demonstrate that he had a "good faith, reasonable belief that the underlying challenged conduct violated [Title VII]." Buettner v. Arch Coal Sales Co., 216 F.3d 707, 714 (8th Cir. 2000).

If the plaintiff succeeds in establishing a prima facie case, a presumption of retaliation results, and the burden of production shifts to the employer, who must rebut the presumption with evidence of a legitimate, nonretaliatory reason for the challenged action. Green, 459 F.3d at 914. If the employer meets that burden, the employee may prevail by showing that the employer's reason was a pretext for retaliation. Id.

Bakhtiari cannot clear the first McDonnell Douglas hurdle because he did not engage in any "protected" actions as an employee of UMR within the meaning of a federal employment discrimination case. Bakhtiari alleges that his protected activity consisted of: his threat that he would pursue his grade appeal with the United States Department of Education; complaining to UMR's international affairs office about the way UMR handled matters pertaining to his student immigration status; and complaining that a UMR student affairs office employee spoke to him in a discriminatory manner during a student conduct investigation. All of these activities pertain to Bakhtiari's status as a student, however, and not as a TA employed by UMR.

Pursuing a grade appeal, even to the Department of Education, does not constitute protected action within the context of Bakhtiari's employment at UMR. In his deposition, Bakhtiari admitted that his grade appeal had

"nothing" to do with his position as a TA, and only impacted the course that he took as a graduate student. See Artis v. Francis Howell N. Band Booster Ass'n, Inc., 161 F.3d 1178, 1183-84 (8th Cir. 1998) (holding that a plaintiff's internal complaints to school officials about the treatment of students is not a protected activity within the scope of Title VII retaliation provisions). Not only is this conduct not protected activity, Bakhtiari could not possibly have a good faith belief that it was protected when he admitted that the grade appeal only impacted the course he took as a student.

Nor do the complaints to the international affairs office about his student immigration status and his complaint about the employee in the student affairs office comprise protected activity. Bakhtiari's participation in these activities did not amount to opposition to prohibited employment practices. Id. at 1183 ("We must first determine whether [plaintiff] engaged in a protected activity, i.e., whether he opposed an unlawful employment practice."). Perhaps they were legitimate complaints about unsavory actions by UMR officials. Nonetheless, that possibility does not transform these complaints into complaints about unlawful employment practices. Complaining about an entity's "actions outside the ambit of an employment practice is unprotected by Title VII." Id. Here, Bakhtiari made complaints about UMR as a university, not about UMR as an employer. Title VII simply does not protect this conduct. Evans v. Kan. City, Mo. Sch. Dist., 65 F.3d 98, 100-02 (8th Cir.1995) (reversing a judgment for a plaintiff teacher's Title VII retaliation claims where alleged retaliation stemmed from teacher's opposition to employer school's desegregation plan and not from teacher's employment with school).

Because we find that Bakhtiari did not engage in protected activity as required by Title VII, we need not consider Bakhtiari's evidence regarding pretext. Hunt v. Neb. Pub. Power Dist., 282 F.3d 1021, 1029 (8th Cir. 2002). Accordingly, we affirm the district court's grant of summary judgment on Bakhtiari's Title VII retaliation claim.

Remaining Claims

Bakhtiari sued each of the defendants in their official capacities only. His failure to name these parties in their individual capacities invalidates his remaining claims for relief under sections 1981 and 1983, and the state law claims, because these state defendants have not waived Eleventh Amendment immunity. Hafer v. Melo, 502 U.S. 21, 25 (1991) (holding that suits against state officials in their official capacities are suits against the state). Bakhtiari claims that because these defendants acted with "malice" and purchased liability insurance, they waived their immunity. Bakhtiari bases his insurance arguments upon the Missouri statutory grant of immunity found in Missouri Revised Statutes §§ 537.600 et seq., not Eleventh Amendment immunity. As the UMR defendants point out, they did not assert immunity pursuant to the Missouri statute, but instead have asserted Eleventh Amendment immunity. Nor are Bakhtiari's malice arguments persuasive. Accordingly, these arguments are without merit, and we affirm the district court's dismissal of these claims.

CONCLUSION

We affirm the district court.

SHEPHERD, Circuit Judge, with whom MURPHY, Circuit Judge, joins, concurring in part and writing separately in part:

I concur in the Court's decision but write separately because I respectfully disagree with the statement in Part II.B that the McDonnell Douglas framework applies to Bakhtiari's retaliation claim "[b]ecause there is no direct *or* circumstantial evidence" of retaliation. Ante at 5 (emphasis added). When a plaintiff produces direct evidence of discrimination or retaliation, the McDonnell Douglas burdenshifting analysis need not be employed. Swierkiewicz v. Sorema N. A., 534 U.S. 506, 511 (2002); Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121 (1985). Circumstantial evidence cases are different, for the law of this circuit instructs that "[b]ecause [Bakhtiari] presented no *direct* evidence of retaliation, we analyze his claim under the McDonnell Douglas burden-shifting analysis." Gilbert v. Des Moines Area Cmty. Coll., 495 F.3d 906, 917 (8th Cir. 2007) (emphasis added); see Carrington v. City of Des Moines, 481 F.3d 1046, 1050 (8th Cir. 2007) ("*In the absence of direct evidence*, the burden-shifting framework of McDonnell Douglas . . . governs retaliation claims.") (emphasis added); Stewart v. Indep. Sch. Dist. No. 196, 481 F.3d 1034, 1042-43 (8th Cir. 2007) ("*Without direct evidence of a retaliatory motive*, we analyze retaliation claims (whether under Title VII, the ADA, or the ADEA), under the burden-shifting framework of McDonnell Douglas . . . .") (emphasis added). Because this is a circumstantial evidence case, I agree that the McDonnell Douglas burden-shifting analysis governs Bakhtiari's retaliation claim and that, under this framework, his claim fails.

Appendix 44

Title VII of the Civil Rights Act of 1964
Volume 42 of the United States Code
***(Sections* 2000e to 2000e-3)**

An Act

To enforce the constitutional right to vote, to confer jurisdiction upon the district courts of the United States to provide injunctive relief against discrimination in public accommodations, to authorize the attorney General to institute suits to protect constitutional rights in public facilities and public education, to extend the Commission on Civil Rights, to prevent discrimination in federally assisted programs, to establish a Commission on Equal Employment Opportunity, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Civil Rights Act of 1964".

* * *

DEFINITIONS

SEC. 2000e. *[Section 701]*

For the purposes of this subchapter-

(a) The term ``person" includes one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, jointstock companies, trusts, unincorporated organizations, trustees, trustees in cases under title 11 *[bankruptcy]*, or receivers.

(b) The term ``employer'' means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of
twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of title 5 *[of the United States Code]*), or

(2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of title 26 *[the Internal Revenue Code of 1954]*, except that during the first year after March 24, 1972 *[the date of enactment of the Equal Employment Opportunity Act of 1972]*, persons having fewer than twenty five employees (and their agents) shall not be considered employers.

(c) The term ``employment agency'' means any person regularly undertaking with or without compensation to procure employees for an employer or to procure for employees opportunities to work for an employer and includes an agent of such a person.

(d) The term ``labor organization'' means a labor organization engaged in an industry affecting commerce, and any agent of such an organization, and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages,

rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization.

(e) A labor organization shall be deemed to be engaged in an industry affecting commerce if (1) it maintains or operates a hiring hall or hiring office which procures employees for an employer or procures for employees opportunities to work for an employer, or (2) the number of its members (or, where it is a labor organization composed of other labor organizations or their representatives, if the aggregate number of the members of such other labor organization) is (A) twentyfive or more during the first year after March 24, 1972 *[the date of enactment of the Equal Employment Opportunity Act of 1972]*, or (B) fifteen or more thereafter, and such labor organization-

(1) is the certified representative of employees under the provisions of the National Labor Relations Act, as amended *[29 U.S.C. 151 et seq.]*, or the Railway Labor Act, as amended *[45 U.S.C. 151 et seq.]*;

(2) although not certified, is a national or international labor organization or a local labor organization recognized or acting as the representative of employees of an employer or employers engaged in an industry affecting commerce; or

(3) has chartered a local labor organization or subsidiary body which is representing or actively seeking to represent employees of employers within the meaning of paragraph (1) or (2); or

(4) has been chartered by a labor organization representing or actively seeking to represent employees within the meaning of paragraph (1) or (2) as the local or subordinate body through which such employees may enjoy membership or become affiliated with such labor organization; or

(5) is a conference, general committee, joint or system board, or joint council subordinate to a national or international labor organization, which includes a labor organization engaged in an industry affecting commerce within the meaning of any of the preceding paragraphs of this subsection.

(f) The term ``employee'' means an individual employed by an employer, except that the term ``employee'' shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision. **With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.**

(g) The term ``commerce'' means trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof; or within the District of Columbia, or a possession of the United States; or between points in the same State but through a point outside thereof.

(h) The term ``industry affecting commerce" means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry ``affecting commerce" within the meaning of the Labor Management Reporting and Disclosure Act of 1959 *[29 U.S.C. 401 et seq.]*, and further includes any governmental industry, business, or activity.

(i) The term ``State" includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act *[43 U.S.C. 1331 et seq.]*.

(j) The term ``religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

(k) The terms ``because of sex" or ``on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e-2(h) of this title *[section 703(h)]* shall be interpreted to permit otherwise. This subsection shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or

except where medical complications have arisen from an abortion: Provided, That nothing herein
shall preclude an employer from providing abortion benefits or otherwise affect bargaining agreements in regard to abortion.

(l) The term ``complaining party'' means the Commission, the Attorney General, or a person who may bring an action or proceeding under this subchapter.

(m) The term ``demonstrates'' means meets the burdens of production and persuasion.

(n) The term ``respondent'' means an employer, employment agency, labor organization, joint labor management committee controlling apprenticeship or other training or retraining program, including an on-thejob training program, or Federal entity subject to section 2000e-16 of this title .

EXEMPTION

SEC. 2000e-1. *[Section 702]*

(a) This subchapter shall not apply to an employer with respect to the employment of aliens outside any State, or to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

(b) It shall not be unlawful under section 2000e-2 or 2000e-3 of this title *[section 703 or 704]* for an employer

(or a corporation controlled by an employer), labor organization, employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining (including onthejob training programs) to take any action otherwise prohibited by such section, with respect to an employee in a workplace in a foreign country if compliance with such section would cause such employer (or such corporation), such organization, such agency, or such committee to violate the law of the foreign country in which such workplace is located.

(c) (1) If an employer controls a corporation whose place of incorporation is a foreign country, any practice prohibited by section 2000e-2 or 2000e-3 of this title *[section 703 or 704]* engaged in by such corporation shall be presumed to be engaged in by such employer.

(2) Sections 2000e-2 and 2000e-3 of this title *[sections 703 and 704]* shall not apply with respect to the foreign operations of an employer that is a foreign person not controlled by an American employer.

(3) For purposes of this subsection, the determination of whether an employer controls a corporation shall be based on- (A) the interrelation of operations; (B) the common management; (C) the centralized control of labor relations and (D) the common ownership or financial control, of the employer and the corporation.

UNLAWFUL EMPLOYMENT PRACTICES

SEC. 2000e-2. *[Section 703]*

(a) It shall be an unlawful employment practice for an employer -

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

(b) It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.

(c) It shall be an unlawful employment practice for a labor organization-

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such

employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) It shall be an unlawful employment practice for any employer, labor organization, or joint labormanagement committee controlling apprenticeship or other training or retraining, including onthejob training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

(e) Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labormanagement committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and (2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or

other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

(f) As used in this subchapter, the phrase ``unlawful employment practice" shall not be deemed to include any action or measure taken by an employer, labor organization, joint labormanagement committee, or employment agency with respect to an individual who is a member of the Communist Party of the United States or of any other organization required to register as a Communist-action or Communist front organization by final order of the Subversive Activities Control Board pursuant to the Subversive Activities Control Act of 1950 *[50 U.S.C. 781 et seq.]*.

(g) Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to fail or refuse to hire and employ any individual for any position, for an employer to discharge any individual from any position, or for an employment agency to fail or refuse to refer any individual for employment in any position, or for a labor organization to fail or refuse to refer any individual for employment in any position, if-

(1) the occupancy of such position, or access to the premises in or upon which any part of the duties of such position is performed or is to be performed, is subject to any requirement imposed in the interest of the national security of the United States under any security program in effect pursuant to or administered under any statute of the United States or any Executive order of the President; and

(2) such individual has not fulfilled or has ceased to fulfill that requirement.

(h) Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of title 29 *[section 6(d) of the Fair Labor Standards Act of 1938, as amended]*.

(i) Nothing contained in this subchapter shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation.

(j) Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor

organization, or joint labormanagement committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

(k) (1) (A) An unlawful employment practice based on disparate impact is established under this title only if-

(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or

(ii) the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.

(B)

(i) With respect to demonstrating that a particular employment practice causes a disparate impact as described in subparagraph (A)(i), the complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact, except that if the complaining party can demonstrate to the court that the elements of a respondent's decision making process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice.

(ii) If the respondent demonstrates that a specific employment practice does not cause the disparate impact, the respondent shall not be required to demonstrate that such practice is required by business necessity.

(C) The demonstration referred to by subparagraph (A)(ii) shall be in accordance with the law as it existed on June 4, 1989, with respect to the concept of ``alternative employment practice''.

(2) A demonstration that an employment practice is required by business necessity may not be used as a defense against a claim of intentional discrimination under this title.

(3) Notwithstanding any other provision of this title, a rule barring the employment of an individual who currently and knowingly uses or possesses a controlled substance, as defined in schedules I and II of section 102(6) of the Controlled Substances Act (21 U.S.C. 802(6)), other than the use or

possession of a drug taken under the supervision of a licensed health care professional, or any other use or possession authorized by the Controlled Substances Act *[21 U.S.C. 801 et seq.]* **or any other provision of Federal law, shall be considered an unlawful employment practice under this title only if such rule is adopted or applied with an intent to discriminate because of race, color, religion, sex, or national origin.**

(l) It shall be an unlawful employment practice for a respondent, in connection with the selection or referral of applicants or candidates for employment or promotion, to adjust the scores of, use different cutoff scores for, or otherwise alter the results of, employment related tests on the basis of race, color, religion, sex, or national origin.

(m) Except as otherwise provided in this title, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

(n) (1) (A) Notwithstanding any other provision of law, and except as provided in paragraph (2), an employment practice that implements and is within the scope of a litigated or consent judgment or order that resolves a claim of employment discrimination under the Constitution or Federal civil rights laws may not be challenged under the circumstances described in subparagraph (B).

(B) A practice described in subparagraph (A) may not be challenged in a claim under the Constitution or Federal civil rights laws-

(i) by a person who, prior to the entry of the judgment or order described in subparagraph (A), had-

(I) actual notice of the proposed judgment or order sufficient to apprise such person that such judgment or order might adversely affect the interests and legal rights of such person and that an opportunity was available to present objections to such judgment or order by a future date certain; and

(II) a reasonable opportunity to present objections to such judgment or order; or

(ii) by a person whose interests were adequately represented by another person who had previously challenged the judgment or order on the same legal grounds and with a similar factual situation, unless there has been an intervening change in law or fact.

(2) Nothing in this subsection shall be construed to-

(A) alter the standards for intervention under rule 24 of the Federal Rules of Civil Procedure or apply to the rights of parties who have successfully intervened pursuant to such rule in the proceeding in which the parties intervened;

(B) apply to the rights of parties to the action in which a litigated or consent judgment or order was entered, or of members of a class represented or sought to be represented in such action, or of members of a group on whose behalf relief was sought in such action by the Federal Government;

(C) prevent challenges to a litigated or consent judgment or order on the ground that such judgment or order was obtained through collusion or fraud, or is transparently invalid or was entered by a court lacking subject matter jurisdiction; or

(D) authorize or permit the denial to any person of the due process of law required by the Constitution.

(3) Any action not precluded under this subsection that challenges an employment consent judgment or order described in paragraph (1) shall be brought in the court, and if possible before the judge, that entered such judgment or order. Nothing in this subsection shall preclude a transfer of such action pursuant to section 1404 of title 28, United States Code.

OTHER UNLAWFUL EMPLOYMENT PRACTICES

SEC. 2000e-3. *[Section 704]*

(a) It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labormanagement committee controlling apprenticeship or other training or retraining, including onthejob training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

(b) It shall be an unlawful employment practice for an employer, labor organization, employment agency, or joint labormanagement committee controlling apprenticeship or other training or retraining, including onthejob training programs, to print or publish or cause to be printed or published any notice or advertisement relating to employment by such an employer or membership in or any classification or referral for employment by such a labor organization, or relating to any classification or referral for employment by such an employment agency, or relating to admission to, or employment in, any program established to provide apprenticeship or other training by such a joint labormanagement committee, indicating any preference, limitation, specification, or discrimination, based on race, color, religion, sex, or national origin, except that such a notice or advertisement may indicate a preference, limitation, specification, or discrimination based on religion, sex, or national origin when religion, sex, or national origin is a bona fide occupational qualification for employment.